Supreme Court, U.S.
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No. 02-

# In the Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

*Petitioner,*

v.

SEAN GREENE,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Metropolitan Transportation Authority (MTA) is a "public authority" created by the New York State Legislature to develop and coordinate a comprehensive system of regional commuter transportation. The MTA owns separately incorporated interstate railroads (the Long Island Rail Road and Metro-North Railroad), as well as a municipal subway and bus system and several intra-city toll bridges and tunnels. The Court of Appeals for the Second Circuit rejected the MTA's claim of sovereign immunity under the Eleventh Amendment. The court also held that the MTA's ownership and control of the separately incorporated railroads made the MTA itself a "common carrier by railroad" under the Federal Employers' Liability Act, 45 U.S.C. § 51 (FELA), so that an employee of the MTA Police Department could sue the agency in federal court for injuries he sustained in a job-related highway traffic accident. There is a conflict between those rulings and decisions of this Court and other circuits on the following questions:

1. In light of the Court's decisions overruling *Parden* v. *Terminal Railway Co. of Alabama State Docks Department*, 377 U.S. 184 (1964), and clarifying the reach of the Eleventh Amendment, does sovereign immunity protect State-created regional transportation agencies from private damage suits brought by their employees invoking the Federal Employers' Liability Act?

2. Is the term "common carrier by railroad" in the Federal Employers' Liability Act properly limited to railroads, the entities that actually provide transportation services, or should the term be extended to include State agencies and parent corporations that are not themselves railroads, but own separately incorporated railroads?

3. Must common-law standards for "piercing the corporate veil" be used to determine whether the parent of an operating railroad may be subjected to the Federal Employers' Liability Act as a "common carrier by railroad"?

## PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 STATEMENT

Petitioner MTA is a State-created public authority and has not issued any stock to the public or to any parent or publicly held company.

Respondent Sean Greene is an individual.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 280 F.3d 224 (2002). Its order denying sovereign immunity (Pet App. 29a) is unreported. The opinion of the District Court (Pet. App. 32a) is reported at 99 F. Supp.2d 268 (E.D.N.Y. 2000).

## JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 2002. A timely petition for rehearing and rehearing *en banc* was denied on November 13, 2002 (Pet. App. 46a). This Court has jurisdiction under 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*(FELA), are set forth at Pet. App. 48a.

## STATEMENT

### A. Factual Background

1. The New York Legislature created the MTA in 1965 as part of the State's Public Authorities Law. See N.Y. Public Authorities Law ("Pub. Auth. L.") § 1263(1)(a) (McKinney 1999). The Governor of New York appoints the MTA's board of directors with the advice and consent of the State Senate. As discussed more extensively in the Reasons for Granting the Writ, *infra*, New York law considers "public authorities" to be "state agencies" carrying out important governmental functions. As specified in Section 1264(1) of the Public Authorities Law, the MTA's responsibilities include:

> "[T]he continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, including but not limited to such transportation by railroad, omnibus, marine and air * * *."

The statute authorizes the MTA to exercise these powers itself or to delegate them to "one or more wholly owned subsidiary corporations." Pub. Auth. L. § 1266(5). Pursuant to this provision, the MTA owns or oversees the following subsidiaries: New York City Transit Authority (the City's subways and buses), several other bus companies, the Triborough Bridge and Tunnel Authority (toll bridges and tunnels), and two commuter railroads, the Long Island Rail Road Company (LIRR) and Metro-North Commuter Railroad Company. The FELA issue presented by this case is whether the MTA is properly treated as a "common carrier by railroad" under the Act solely because it supervises the financial and ancillary affairs of and owns one of its corporate subsidiaries, the Long Island Rail Road, which is a "common carrier by railroad" under FELA.

The MTA and its operating subsidiaries have their own separate work forces with separate labor contracts. Collectively, the subsidiaries employ some 60,000 workers. The MTA itself has approximately 1,000 of its own employees. Each of the subsidiaries, including the LIRR, conducts its own operations with varying degrees of oversight from the MTA as necessary to achieve the Legislature's goal of assuring an efficient, coordinated, regional transportation network.

In 1997, the Legislature authorized the MTA to create a single police department for all of its operations and those of its subsidiaries. Pub. Auth. L. § 1266-h(1). Pursuant to this statute, the MTA consolidated the separate police forces that its subsidiaries had maintained, forming the MTA Police Department. Respondent Sean Greene, a former LIRR police officer, invoked his right under Pub. Auth. L. § 1266-h(2) to become a member of the new MTA Police Department and hence an employee of the MTA.

2. In March 1998, Greene was involved in an automobile accident while responding to a reported auto theft at a parking lot near an LIRR train station. His car collided with another vehicle on a public street. Claiming disabling injuries, he received $80,000 from the MTA in unlimited sick

pay and medical benefits.

**B. Proceedings Below**

1. Despite receiving worker's compensation benefits, Greene brought suit under FELA in the United States District Court for the Eastern District of New York, asserting claims against the MTA for personal injuries arising out of the automobile accident. FELA authorizes an employee of an interstate "common carrier by railroad" to bring suit against the "carrier" in a federal court for injuries caused by the negligence "of such carrier." 45 U.S.C. § 51. Greene alleged that the MTA was negligent in failing to provide him with safe working conditions, namely a safer automobile. The MTA moved to dismiss, arguing that the MTA is not subject to FELA because the MTA — as distinct from the LIRR — is not a "common carrier by railroad" under the Act and thus that the MTA's employees may not assert a cause of action under the Act.

The district court "reluctantly" denied the motion and applied what it called this "outmoded" statute to the MTA. Pet. App. 33a. The court acknowledged that the MTA and the LIRR are separate legal entities.[1] The court held, however, that an entity is a covered common carrier if it "operates" a railroad and that, by virtue of the MTA's "extensive involvement" in the LIRR's activities, the MTA "operates" the railroad. Pet. App. 43a. The court rejected as irrelevant the New York case law holding, under common law "veil piercing" standards, that the MTA is not legally responsible for its subsidiary railroads' operations. The court declared that "it is not the corporate form of the entity" that determines an entity's status, but the "functions" it performs. The court ruled that FELA requires "nothing more" on the part of a parent "than to 'perform a function'" in connection

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[1] The New York Legislature chartered the LIRR in 1834. It is the largest commuter railroad in America and the oldest railroad of any kind still operating under its original name. In 1980, the LIRR became a wholly owned corporate subsidiary of the MTA.

with the subsidiary's railroad activities. Pet. App. 42a. Accordingly, the court held that the MTA, as the parent of the LIRR, is equally subject to FELA liability as a "common carrier by railroad." Recognizing that this ruling involved a "controlling question of law," the district court certified it for immediate appeal pursuant to 28 U.S.C. § 1292(b).

2. The Second Circuit allowed the appeal and affirmed. Pet. App. 1a. The court never suggested that the MTA is actually a "railroad." Instead, asserting that FELA reaches any entity that is substantially involved in the "management and operation of the business" of a railroad, the court held the MTA subject to FELA liability because the agency exercises a supervisory and managerial role over the ***financial and ancillary*** affairs of the LIRR. Pet. App. 8a, 20a-27a. The court focused on the MTA's involvement "in essential business aspects of LIRR operations as well as in providing police services that are directly in furtherance of LIRR's business as a railroad." Pet. App. 27a. The court also pointed to the MTA's "participation in the budgeting, capital raising, marketing, advertising, real estate, risk management, and labor relations aspects of LIRR operations." Pet. App. 26a.

Like the district court, the Second Circuit rejected the MTA's argument that the MTA could not be treated as a "common carrier by railroad" under FELA unless the formal, legal distinction between the MTA and the LIRR was essentially a sham under the common-law doctrine allowing courts to "pierce the corporate veil."

3. While the MTA's timely rehearing petition was pending, this Court decided *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002). There a majority of the Court declared, contrary to Second Circuit precedent, see *Feeney* v. *Port Authority Trans-Hudson*, 873 F.2d 628 (1989), aff'd on other grounds, 495 U.S. 299 (1990), that a State agency may invoke sovereign immunity without demonstrating that a judgment against it would have the same effect on the State treasury as a

judgment directly against the State itself. Since sovereign immunity may be invoked at any stage of the proceedings, *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998), the MTA promptly filed a motion invoking the State's immunity under the Eleventh Amendment and requesting that the court vacate its judgment and remand with directions to dismiss.

While emphasizing the impact of *South Carolina State Ports* upon the Second Circuit's prior case law, the motion also explained that there is a substantial financial interconnection between the MTA and the State treasury. For the last nine years, the MTA has received on average $187 million a year from the State's general fund as part of the transportation assistance program (N.Y. Transp. L. § 18-b (McKinney 1999)) and approximately $1 billion a year in "dedicated taxes" (N.Y. Pub. Auth. L. § 1270-c).

The Second Circuit denied this motion as well as the MTA's petition for rehearing *en banc*. Pet. App. 29a, 46a.

## REASONS FOR GRANTING THE WRIT

### I. A State-Created Transportation Agency Is Entitled to the State's Sovereign Immunity from Employees' Personal Injury Suits under FELA.

1. The Court has repeatedly reminded lower courts that States remain separate sovereigns under the Constitution and, along with their agencies and instrumentalities, enjoy immunity from private federal causes of action for damages. *E.g.*, *South Carolina State Ports Auth.*, *supra*; *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55-57 (1996).

This Court's recent cases treat States and State agencies equivalently for Eleventh Amendment purposes. See, *e.g.*, *South Carolina State Ports Auth.*, 535 U.S. at __ (slip op. 5 n.6) (holding that the State Ports Authority "is protected by South Carolina's sovereign immunity because it is an arm of the State"); *Kimel*, 528 U.S. at 69 (treating State university as "an instrumentality of the State of Alabama" and upholding its claim to sovereign immunity); *Garrett*, 531 U.S. 356

(same). See also *California Med. Bd.* v. *Hason*, No. 02-479, certiorari granted, November 18, 2002 (Does Eleventh Amendment bar ADA suit against State medical board for denying medical license?).

2. The Court has recognized these principles in the specific context at issue here, holding that the Federal Constitution limits FELA's applicability to States that operate railroads. The background begins with the now-repudiated decision in *Parden* v. *Terminal Railway Co. of Alabama State Docks Department*, 377 U.S. 184, 186 (1964). There the Court held that the employee of a State-owned interstate railroad could sue the railroad in a federal court under FELA and that the State's sovereign status was no bar to applying FELA. The Court reasoned that (1) nothing in FELA explicitly exempted State-owned railroads from coverage and that (2) the State had "waived" whatever immunity it otherwise might have had by engaging in regulated interstate railroad operations.

Subsequent developments in the Court's federalism jurisprudence, however, led the Court to overrule both premises of *Parden*. In *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Court held that there was "no doubt" that *Parden*'s approach to State immunity "is no longer good law." The Court overruled *Parden* to the extent that it was "inconsistent with the requirement" that any congressional intent to regulate a State's activity and to abrogate the State's immunity — even if otherwise within Congress's constitutional power — "must be expressed in unmistakably clear language." *Id.* at 478. Then, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999), the Court overruled *Parden*'s theory of constructive waiver, holding it impossible to square with cases "requiring that a State's express waiver of sovereign immunity be unequivocal." Thus, the Court has now established that (1) FELA does not attempt to abrogate the States' sovereign immunity and (2) States do not waive their sovereign

immunity by engaging in interstate railroad operations.[2]

3. In light of the Court's subsequent treatment of *Parden*, there can be little doubt that a State-owned or operated railroad is constitutionally immune from damage suits under FELA. The plaintiff in *Parden* had brought suit against the "Terminal Railway, Alabama State Docks." *R.B. Parden* v. *Terminal Ry. of the Ala. State Docks Dept.*, 311 F.2d 727, 728 (5th Cir. 1963), rev'd, 377 U.S. 184 (1964). This Court accepted the Terminal Railway's status as "an agency of the State" (377 U.S. at 185) and decided the Eleventh Amendment questions without regard to the fact that the defendant was a State "agency" and not technically the State itself. The Court assumed that, but for its (subsequently rejected) view of implicit waivers of Eleventh Amendment immunity, the Terminal Railway would have qualified for immunity in its status as a State agency.

Now that the Court has swept away the two grounds for withholding immunity in *Parden*, the sovereign immunity of a State-owned railroad is patent. The Alabama Supreme Court, therefore, recently held that the Terminal Railway is entitled to Eleventh Amendment immunity from private FELA actions under this Court's current Eleventh Amendment jurisprudence. See *Alabama State Docks Terminal Ry.* v. *Lyles*, 797 So.2d 432, 438 (2001). The decision below thus conflicts with *Lyles*.

4. The Court's approach to the constitutional status of

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[2] FELA suits may be brought in the ***State courts*** of those "few States" that were deemed to "consent" to being sued in their own courts when they excluded railroad workers from their workers' compensation laws on the assumption that FELA would provide the compensation remedies for those workers. See *Alden* v. *Maine*, 527 U.S. 706, 737-38 (1999); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991). This narrow exception has no bearing here. Greene was eligible for extensive benefits under New York's workers' compensation law and actually received more than $80,000 in benefits.

State instrumentalities, treating them as equivalent to the State itself for Eleventh Amendment purposes, cloaks the MTA with sovereign immunity from FELA claims. The principal functions that the MTA performs, providing and coordinating regional transportation, have traditionally been viewed as falling within the powers of a sovereign. See, *e.g.*, U.S. Const., Art. I, § 8, cl. 7 (authorizing Congress to establish post roads); *South Carolina State Ports Auth.*, 535 U.S at __ (slip op. 5 n.6) (applying sovereign immunity to a State "authority" created to "develop and improve" the State's harbors and ports); 49 U.S.C. §§ 101, 102 (creating U.S. Department of Transportation). Indeed, the precise function that Greene was performing when the accident occurred, providing police protection for the public, is itself a sovereign function. See *Foley* v. *Connelie*, 435 U.S. 291, 297 (1978) (recognizing that policing is a sovereign function); *Morris* v. *Washington Metro. Area Transit Auth. (WMATA)*, 781 F.2d 218, 220 (D.C. Cir. 1986) (same).

As the recent *South Carolina State Ports Authority* decision illustrates, a State Legislature's decision to assign the performance of sovereign functions to a "public authority" rather than an "executive department" is irrelevant. If the New York Legislature had designated a State executive department, such as the New York Department of Transportation, to perform the roles assigned to the MTA, there would be no doubt that the executive department would be immune from liability under FELA. Indeed, the MTA's co-venturer in overseeing the Metro-North railroad under a congressionally approved Compact between New York and Connecticut (Pub. L. 91-159, 83 Stat. 441 (1969)) is a State executive department, the Connecticut Department of Transportation. See N.Y. Transp. L., App. 5.

5. The MTA's constitutional status as an instrumentality of the State of New York, entitled to the State's sovereign immunity, is undeniable. The State itself views the MTA as its sovereign instrumentality. The MTA was created by special act of the New York Legislature under Article X,

Section 5, of the State Constitution governing creation of public authorities. The Governor appoints the MTA's board of directors, subject to confirmation by the State Senate; the Governor may remove them from office for misconduct or "neglect of duty." Pub. Auth. L. § 1263(1)(a), (7).

The Legislature treats the MTA as an organ of the State, declaring that the MTA is "performing an essential governmental function in carrying out its purposes." Pub. Auth. L. § 1264(2). It reiterated this policy in declaring that the MTA enjoys the State's tax exemption. Pub. Auth. L. § 1275. New York statutes characterize the MTA as a "state agency." Pub. Auth. L. § 1261(13); see Pub. Auth. L. § 1263(5) (noting that MTA is a State agency for certain purposes of the Public Officers Law). In *Easley* v. *New York State Thruway Authority*, 135 N.E.2d 572, 573 (N.Y. 1956), the State's highest court held that a "public authority" is "an arm or agency of the State" carrying out governmental functions. Various lower courts similarly have characterized the MTA as a "state agency" or as the "state's instrument." *E.g.*, *Roitman* v. *N.Y.C. Transit Auth.*, No. CV-88-0448, 1991 WL 81924, at *1 (E.D.NY. May 6, 1991); *Majer* v. *MTA*, No. 90 Civ. 4608, 1990 WL 212928, at *3 (S.D.N.Y. Dec. 14, 1990); *Kaelin* v. *Long Island R.R. Co.*, 504 F. Supp. 656, 658 (E.D.N.Y. 1980). Indeed, Officer Greene was covered by State statutes defining benefits for state employees, including benefits for job-related injuries, which he received.

The most direct proof of the State's intent on the immunity issue is Section 1276 of the Public Authorities Law. It gives the "consent of the state" to some persons to bring enumerated types of suits against the MTA, but limits that consent by imposing special procedural and temporal preconditions to suit. Greene's suit is ***not*** one of the enumerated types. MTA employees such as Greene are given an "exclusive" administrative remedy for work-related injuries, under Section 11 of the New York Workers' Compensation Law. In upholding the constitutionality of these limitations on the ability to sue the MTA, the New

York courts have expressly justified them as "condition[s] of the State's limited waiver of [the MTA's] sovereign immunity." *E.g.*, *Umansky* v. *MTA*, 491 N.Y.S.2d 33, 34 (App. Div. 1985) . Except to the extent that this "consent" has been given, therefore, the State assumes that the MTA shares in the State's sovereign immunity from suit.

In sum, the New York State Legislature vested the MTA with sovereign powers and treats the MTA as an organ of the State. Therefore, this Court's doctrine treating State agencies as the equivalent of the State in the eyes of the Eleventh Amendment bars FELA suits like this one.

6. Nevertheless, the Second Circuit allowed respondent Greene to proceed with his FELA suit despite the MTA's claim of sovereign immunity. The Second Circuit and the Third Circuit have concluded that transit agencies may not claim sovereign immunity unless money judgments against them would have "the same practical consequences as a judgment against the State itself." *Fitchik* v. *New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 660-62 (3d Cir. 1989) (*en banc*); *Feeney* v. *Port Auth. Trans-Hudson*, 873 F.2d 628 (2d Cir. 1989), aff'd on other grounds, 495 U.S. 299 (1990). Similarly, at least two circuits have concluded — even after *South Carolina State Ports Authority* — that impact of a judgment against a State agency upon the State's treasury is a critical factor in determining the agency's right to sovereign immunity. See *Aguon* v. *Commonwealth Ports Auth.*, No. 01-16613, 2003 WL 102994, *2 (9th Cir. Jan. 13, 2003); *Perez* v. *Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326-27 (5th Cir. 2002).

Other circuits, by contrast, have recognized that State agencies like the MTA may claim sovereign immunity (except to the extent immunity has been waived), even if a judgment does not operate directly against the State treasury. See *Morris*, 781 F.2d at 220 (recognizing that D.C.-area transit agency performs governmental functions, including policing, and is entitled to sovereign immunity); *Abdulwali* v. *WMATA*, No. 01-7165, 2003 WL 104872 (D.C. Cir. Jan. 14,

2003) (same); cf. *Strykowski* v. *Northeast Ill. Regional Commuter R.R. Corp.*, 30 F.3d 136, 1994 WL 287395 (7th Cir. 1994) (unpublished) (raising issue of transit agency's Eleventh Amendment immunity *sua sponte* and remanding for adjudication).

This Court should resolve this circuit conflict. The impact-on-the-state-treasury test adopted by the Second and Third Circuits derives from divided opinions of this Court in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), and *Hess* v. *Port Authority Trans-Husdon Corp.*, 513 U.S. 30 (1994). In *South Carolina State Ports Authority*, however, a majority of the Court rejected that test. The Court upheld immunity where the request for a cease-and-desist order directed against a State agency carried no financial consequences at all for the State treasury. The Court explained that the "primary function of sovereign immunity is not to protect State treasuries * * * but to afford the States the dignity and respect due sovereign entities." 535 U.S. at __ (slip op. 24).[3]

The Second Circuit should have recognized that construing FELA to authorize MTA employees to bring negligence claims against this State agency in a federal court conflicts with the Eleventh Amendment under the current, controlling standard. Not only did the court improperly federalize a local auto accident claim against a State-created agency, it disregarded the impact its decision will have upon

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[3] The dissenters in *South Carolina Ports Authority* disagreed with the Court's conclusion that the Eleventh Amendment constrains ***federal administrative tribunals*** from asserting jurisdiction over a State agency in its dispute with a private party, but agreed that the Eleventh Amendment precludes ***federal courts*** from asserting jurisdiction over a State instrumentality. See 535 U.S. at __ (slip op. 3) (Stevens, J., dissenting), *id.* at __ (slip op. 10) (Breyer, J., dissenting) (Eleventh Amendment bars "a private individual" from hauling a State agency into federal court to pursue a claim for damages).

the State's ability to regulate the quintessentially sovereign function of law enforcement by determining what rights and remedies are available to law-enforcement personnel injured in the line of duty. As explained below (pp. 27-28), this issue affects dozens of transportation agencies created by other States to perform functions similar to the MTA's.

## II. The Second Circuit's Construction of FELA Is Inconsistent with Its Text and Legislative Purpose, Conflicts with Decisions of This Court and Other Circuits, and Distorts the Framework of Federal Regulation of "Railroads" by Federal Agencies.

An equally important issue is whether FELA applies at all to entities — government agencies or commercial companies — that own separately incorporated railroads.

### A. Interpreting FELA As Subjecting State Agencies That Own Railroad Companies To Federal Liability For Local Work-Related Accidents Violates This Court's "Clear Statement Rule."

1. The New York Legislature assigned to the MTA the responsibility to improve and coordinate transportation services available to commuters in the New York metropolitan area. These are primarily matters of local concern within the authority of the States and their instrumentalities. As the Court emphasized just a few months ago: "Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *South Carolina State Ports Auth.*, 535 U.S. at __ (slip op. 6). Congress's authority to "legislate in areas traditionally regulated by the States" is an "extraordinary power" that is presumably "not exercise[d] lightly." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1988) (quoting *Atasacadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)).

Therefore, before a court may accept an argument that

Congress has intruded into areas traditionally regulated by the States and that Congress has acted to "displace state regulation" over traditionally local activities, "the federal statutory purpose must be 'clear and manifest.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990)); cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This aspect of the "clear statement rule" is "rooted in * * * concepts of American federalism" and "assures that the legislature has in fact faced" and resolved the question whether to displace the States' primary responsibility for regulating matters of an essentially local nature. *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

A policy of restraint in interpreting a federal statute is especially important when the issue is whether Congress created a federal cause of action allowing employees of a State agency to bring local accident claims against the agency in a federal court. The Court has held that Congress is presumed ***not*** to have created a federal claim against a State agency except "by clearly expressing such an intent," and the Court has construed ambiguous statutes to avoid impinging upon this important principle of federalism. *E.g.*, *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 779 (2000).

Moreover, recognition of a federal cause of action expands the jurisdiction of the federal courts. Here the only basis alleged for federal jurisdiction was FELA. It is presumed, however, that Congress has not expanded the jurisdiction of the federal courts, when the matter is questionable, even if there is a palpable federal interest at stake. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1102 (1991); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 91-94 (1981).

2. The Second Circuit's willingness to infer the existence of a federal cause of action against the MTA for local auto accident claims collides with these important principles.

Where FELA applies, it displaces state-law regulation of accidental injury claims. See, *e.g.*, *South Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1952). Congress originally enacted FELA in 1906 when various state common-law defenses denied railroad workers a meaningful opportunity to recover for their work-related injuries, despite the inherently dangerous nature of working on the railroad. FELA thus displaces traditional defenses such a contributory negligence (45 U.S.C. § 53), assumption of the risk (45 U.S.C § 54), and the fellow-servant doctrine (*Chesapeake & Ohio Ry.* v. *De Atley*, 241 U.S. 310 (1916)).

Congress focused, however, on extending federal protection to employees of interstate ***railroads*** injured in connection with railroading. It is impossible to discern any federal interest in creating a federal tort system for employees of State agencies (or commercial holding companies) that merely own and control operating railroads, especially where those employees (like Greene, a police officer injured in a local traffic accident) have nothing to do with railroading. Like other States, New York has a well-developed body of law that governs the claims of employees who suffer work-related injuries. Injured MTA employees are entitled to State benefits (see N.Y. Workers' Comp. L. § 2(3)), which the plaintiff in this case in fact received. In addition, the New York Legislature has carefully regulated the liability of the MTA by establishing specific preconditions that must be met before an action based on State law may be brought against it. Pub. Auth. L. § 1276.

To the extent FELA is found to apply to the State agency's own employees, as the court below held, the federal standards directly displace the State's legislative scheme. Interpreting FELA as broadly as the Second Circuit did, thus allowing MTA employees to circumvent the comprehensive State tort and worker compensation systems, intrudes upon an area traditionally regulated by the States. Greene's claim against the MTA is a run-of-the-mill auto-accident tort claim of the sort State courts and administrative tribunals (such as

workers' compensation boards) adjudicate every day under State law. There is ***no palpable federal interest*** to counterbalance the State's interests or to justify interpreting FELA so expansively that this type of dispute may automatically be brought into a federal court to be tried under federal standards of liability.

3. Not surprisingly, there is no "clear statement" in FELA that Congress intended to confer preemptive federal rights on employees of State agencies that own railroads or attempted to authorize federal courts to entertain such damage suits against State agencies. Since there was no such "clear and manifest" statement of congressional intent, the Second Circuit subverted this Court's doctrine by construing FELA as granting plaintiff a federal cause of action for a local tort claim against this State agency.

**B. Extending FELA to Entities That Control Separately Incorporated Railroads Conflicts With This Court's Interpretation Of FELA, With FELA's Legislative Purpose, And With Decisions Of Other Circuits.**

FELA gives employees of "common carriers by railroad" a federal cause of action for damages:

> "Every ***common carrier by railroad*** while engaging in interstate commerce * * * shall be liable in damages to any person suffering injury ***while he is employed by such carrier*** in such commerce * * * for such injury or death resulting in whole or in part ***from the negligence*** of any officers, agents or employees ***of such carrier*** * * *." 45 U.S.C. § 51 (emphasis added).

As construed by this Court, other federal circuits, and federal agencies, FELA's text only reaches "railroads" and employees of "railroads." No one questions that the MTA is not a "railroad." Despite the Second Circuit's decision to extend the statute to other agencies and companies, the statute as drafted does not cover parent companies or State agencies that are not themselves "railroads" but ***own***

separately incorporated railroads.

1. *Conflict With This Court's Decisions.* Originally enacted in 1906, FELA was designed to create an adequate federal remedy for persons engaged in what was viewed as the inherently dangerous business of railroading. This benevolent purpose has no substantial connection with working conditions at a parent company or State agency that owns a separate, operating railroad which has its own separate FELA-protected work force.

The term "common carrier by railroad" had a settled, ordinary meaning in 1906; it has been interpreted consistently since then. It covers only entities that directly provide the transportation services, not their parents or other affiliates. In an early FELA decision, this Court held that a "common carrier by railroad" is "a ***railroad company*** acting as a common carrier." *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 187 (1920) (emphasis added). "This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a ***going railroad***." *Id.* at 187-88 (emphasis added). Applying this common-sense understanding that FELA only applies to a "railroad company" that is a "going railroad," the Court held that an express company that did not itself provide railroad transportation but used and paid others for such transportation was not a "common carrier by railroad" despite its intimate connection with railroading. *Id.* at 188.

The Court later relied on *Wells Fargo*'s "going railroad" definition in deciding that a company that owned, maintained, and leased railroad refrigerator cars to railroads for transporting perishable products was not itself a "railroad" within the scope of FELA. *Edwards* v. *Pacific Fruit Express Co.*, 390 U.S. 538 (1968). The Court stressed that, to be subject to FELA, an entity must be a "going railroad." *Id.* at 540-41. The Court emphasized that "there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to

railroading, are yet not railroading itself." *Id.* at 540. Thus, FELA's text frames a simple, straightforward threshold question: Is the defendant a "railroad" in the ordinary meaning of that term? Only then is it necessary to ask whether the ***railroad*** is operating as a "common" carrier (as distinct from a private or contract carrier) or is conducting "interstate" (as distinct from purely intrastate) operations. The statute contains no textual hook for reaching the employees of a State agency or private parent company that is not actually a railroad.

This "plain language" interpretation hews closely to FELA's legislative purpose. Congress enacted FELA to respond to the special needs of ***railroad*** workers who are exposed to daily risks inherent in railroading. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 59 (1943); H.R. Rep. No. 60-1386, at 1-3 (1908). The statute imposes federal liability on "railroads" to provide compensation for on-the-job injuries sustained by their employees, but the Act is limited to the entities that function as actual railroads.

In 1939, Congress broadened the category of employees of a ***railroad*** who are entitled to FELA protection.[4] But as this Court explained in *Pacific Fruit Express*, *supra*, in reaffirming the "going railroad" test, Congress refused to enact a proposal "to broaden the meaning of railroads" under the Act and thus "declined to extend coverage of the Act to activities and facilities intimately associated with the business of common carrier by railroad" but not conducted by a "railroad." 390 U.S. at 541. In its quest to broaden the scope of covered "railroads," the Second Circuit simply blew past this red signal. Under this Court's "*Wells Fargo/Pacific*

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[4] Under the 1939 Amendment, covered employees include any "employee ***of a carrier***, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce." Ch. 685, 53 Stat. 1404 (emphasis added). See *Reed* v. *Pennsylvania R.R. Co.*, 351 U.S. 502, 505 (1956).

*Fruit*" test, the MTA is not a "common carrier by railroad" because it is not itself a "going railroad" and does not provide "railroading" services. The only "railroad" involved in this case, and thus the sole entity governed by FELA, is the LIRR, a separate legal entity.

2. *Conflict With Other Circuits*. The Second Circuit stands alone in refusing to recognize, as other circuits have, that the threshold issue for FELA coverage is whether the defendant itself is a railroad, an entity engaged in the "actual performance of rail service." Compare, *e.g.*, *Iverson* v. *Southern Minn. Beet Sugar Co-op*, 62 F.3d 259, 262 (8th Cir. 1995); *Felton* v. *Southeastern Pa. Transp. Auth.*, 952 F.2d 59, 62 (3d Cir. 1992); *Sullivan* v. *Scoular Grain Co.*, 930 F.2d 798, 801 (10th Cir. 1991); *Kieronski* v. *Wyandotte Terminal R.R. Co.*, 806 F.2d 107 (6th Cir. 1986); *Lone Star Steel Co.* v. *McGee*, 380 F.2d 640, 647 (5th Cir. 1967).

Applying a plain language reading of the statute, these other circuits have refused to extend FELA coverage based on the theory, which the Second Circuit accepted, that a corporation becomes a "common carrier by railroad" when it is closely affiliated with an operating railroad, even though the defendant itself does not provide the rail services. Thus, in *Iverson*, the Eighth Circuit rejected the claim that a separate corporate "agent" of the railroad was covered, explaining that Congress had not extended FELA liability beyond the actual railroad itself. 62 F.3d at 264.

Similarly, in a case that is irreconcilable with the decision below, the Third Circuit in *Felton* rejected an effort by an employee of another regional transportation agency, the Southeastern Pennsylvania Transportation Authority (SEPTA), to hold that parent agency liable under FELA. The court reached that conclusion, even though SEPTA, like the MTA, is "organizationally affiliated with an interstate common carrier" and even though SEPTA actually controlled the operations of its various divisions, one of which, like the LIRR here, "is subject to FELA." 952 F.2d at 61. See also *Williams* v. *CSX Transp., Inc.*, No. 01-3433, 2002 WL

31618455 (E.D. Pa. Nov. 2002) (following *Felton*, refusing to hold railroad's corporate affiliate subject to FELA).

All this seemed settled until the Second Circuit revisited these concepts and, for the first time in a century of FELA jurisprudence, held that a parent may be liable under FELA because it exerts some control over a separately incorporated, operating railroad. In so holding, the Second Circuit mistakenly relied on *Lone Star Steel*, *supra*. There the Fifth Circuit created a test to determine when an operating ***railroad*** is an "interstate" railroad as distinguished from an intrastate railroad and is a "common" carrier rather than a private or contract carrier. *Id.* at 647. Some other circuits have used this test to guide the same inquiries. See, *e.g.*, *Iverson*, 62 F.3d at 262-63. The Second Circuit, however, misused the Fifth Circuit's test to answer a question for which the test had not been designed and for which no circuit had ever used it: to determine whether the defendant is a "railroad" in the first place The predicate for using the *Lone Star* test is that the entity in question first be a "railroad" engaged in the "actual performance of rail service," as it was in *Lone Star* and all of the cases cited.

3. *Irrelevance Of Section 7.* The Second Circuit also drew support for its expansive view of FELA by looking to Section 7, which states that the term "common carrier" includes "the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." 45 U.S.C. § 57. The court misunderstood that section's limited scope.

First, this statutory provision does not, by its terms, reach the ordinary parent-subsidiary relationship. If it did, Congress simply would have stated that FELA applies to "***any*** person or corporation that owns, manages or operates a common carrier." The reference to "other persons or corporations charged with the duty" of operating a railroad is limited by the concept of "receiver or receivers" that precedes it. As the Court has noted, "a word is known by the company it keeps." *Sprietsma* v. *Mercury Marine*, 537 U.S.

__ (2002) (slip op. 10) (internal quotation marks omitted). The initial reference to "receiver or receivers" signifies the limited kind of legal successor in interest that Congress had in mind when it added to "receivers" "other" persons "charged with the duty" of operating a railroad. The statute embraces only similar kinds of persons who formally displace the owners and managers of the operating railroad as part of some legal substitution similar to receivership, for example, trusteeship. Cf. 49 U.S.C. § 11141 (for regulatory purposes, "rail carrier" includes "a receiver or trustee of a rail carrier").

This Court has recognized that this narrow provision in Section 7 does not provide a predicate for dramatically expanding the scope of FELA to reach ordinary corporate parents. In enacting Section 7, Congress merely "provided that railroad employees could recover regardless of the '***survival***' of the tortfeasor railroad" and the section simply allows a suit to "continue against the receiver ***or successor corporation*** of the railroad." *Cox* v. *Roth*, 348 U.S. 207, 209 (1955) (emphasis added). Thus, Section 7 deals with "persons or corporations" who, like "receivers," assume the legal status of successors in interest "charged with the duty" of running the railroad after some extraordinary corporate event. Section 7 assures that any FELA liabilities a railroad incurred will be satisfied by the "person or corporation" that takes over the railroad's assets and the "duty" of running the railroad, even if the original railroad corporation has ceased to have a separate, legal existence.

Second, influenced by concerns of federalism discussed above, this Court has presumed that, when Congress enacts a statute imposing civil liability on a "person," that term "does ***not*** subject a State (or State agency) to liability in such actions." *Stevens*, 529 U.S. at 787-88 (emphasis added). Thus, even if Section 7 applied to business corporations other than those serving as "receivers" or similar successors, the term "person" would not reach State agencies such as the MTA. In sum, no provision of FELA justified the Second

Circuit's imposition of liability on the MTA simply because it coordinates the affairs of its subsidiaries.

4. *Reliance On Irrelevant Decisions Under Other Statutes*. The Second Circuit went astray by uncritically applying language in some of this Court's cases upholding expansive coverage of railroad affiliates, such as terminal facilities and stockyards, under other federal statutes, such as the Interstate Commerce Act (ICA), which contain specialized definitions of covered entities.[5] The Second Circuit relied on two ICA cases, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), and *United States* v. *Union Stock Yard & Transit Co.*, 226 U.S. 286 (1912), for the proposition that "a company that has neither its own rolling stock nor corporate stock in railroad companies may be considered a 'railroad' if it is part of an integrated corporate family that includes common carriers by railroad and if it constitutes a necessary link to those carriers." Pet. App. 19a. From the proposition that some Interstate Commerce Commission (ICC) regulatory jurisdiction extends to an "integrated corporate family," the Second Circuit extrapolated to conclude that a holding company that owns a railroad subsidiary is a "railroad" for private FELA lawsuits.

The ICA, however, incorporated a specific definition of "railroads" that embraced many types of entities that were not "railroads" in the ordinary sense. See *Southern Pacific Terminal Co.*, 219 U.S. at 523. Congress evidently concluded that a special, expansive definition was necessary to assure that ICC regulation of the railroad industry would be effective. See, *e.g.*, *Union Stock Yard*, 226 U.S. at 308. Against this backdrop, this Court determined that the ICA

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[5] Also invoked were *United States* v. *Brooklyn E. Dist. Terminal*, 249 U.S. 296 (1919) (construing Federal Hours of Service Act, 45 U.S.C. §§ 61-64 (1986) (repealed 1994)), and *United States* v. *California*, 297 U.S. 175 (1936) (Federal Safety Appliance Act, 45 U.S.C. § 6).

swept broadly. See *Southern Pacific Terminal Co.*, 219 U.S. at 522-23; *Union Stock Yard*, 226 U.S. at 304.

FELA, by contrast, has no specialized statutory definition that would support interpreting the statutory term "railroad" as including an entity such as the MTA that is not a railroad. Moreover, there is no comparable legislative purpose to extend a private federal cause of action for negligence to employees of entities that are not railroads. Other circuits have explicitly rejected the approach taken by the Second Circuit and refused to rely on non-FELA cases in determining the reach of the statute. They adhere instead, in the words of the Tenth Circuit, to "the statutory requirements identified by the [Supreme] Court in *Wells Fargo* and *Pacific Fruit*", the "going railroad" test. *Sullivan*, 930 F.2d at 801. There the court declined to classify a joint venture between a warehouse lessor and a grain company that owned or leased miles of railroad track, hundreds of railroad cars and switch engines, as a "common carrier by railroad," because it was not a "going railroad." See *id.* at 800-01.

5. *Conflict With The Settled Framework Of Federal Regulation By Federal Agencies.* The Second Circuit's reliance on language lifted from decisions under the ICA is ironically misguided. The agencies administering the ICA (the ICC and its successor, the Surface Transportation Board (STB)) have never contended that an agency like the MTA becomes a "railroad" because it owns and controls a separately incorporated railroad subsidiary. Instead, the ICC declared that "a finding that States incur a common carrier obligation merely by owning a rail line" that is operated by a separate entity "is contrary to established Commission policy and contrary to the purpose" of the Act. *Common Carrier Status of States, State Agencies and Instrumentalities*, 363 I.C.C. 132, 1980 ICC LEXIS 73, *12 (1980). See, *e.g.*, 49 C.F.R. § 1150.22 (State agency "will be considered a common carrier" only if "the State intends to operate the line itself" but not if it uses a separate "operator to provide service over the line"; in that event, "only the operator incurs

a common carrier obligation.").

The ICC applied the same analysis to corporate parents of operating railroads. See, *e.g.*, *Guilford Transp. Indus., Inc.*, 366 I.C.C. 294 at 62-63 (1982) (a holding company that did not itself "provide any type of rail service" but "perform[ed] an oversight function, coordinating activities, and establishing policy" for its railroad subsidiary was not a "carrier" under the Act). In upholding this distinction, the D.C. Circuit observed, in words equally apt here, that "Congress understood the difference between a 'carrier' and a holding company that owns a carrier" and that, "if Congress had wanted to include holding companies within the ambit" of ICC regulation of common carriers by railroad, "it knew how to say so." *Lamoille Valley R.R. Co.* v. *ICC*, 711 F.2d 295, 329 & n.78 (D.C. Cir. 1983) (citing cases from other circuits "assuming that a holding company that owns a carrier is not itself a carrier").

Reflecting this settled distinction, federal regulation of the railroad industry, including the safety of railroad employees, focuses on the "rail carrier" itself, defined as the "person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5); see 49 C.F.R §§ 200.3(i), 214.3, 217.3(a), 218.3(a), 239.3(a). Similarly, the requirements for various federal regulatory approvals distinguish between the railroad company and the entity that controls the railroad company. *E.g.*, 49 U.S.C. §§ 10901(4), 11323(a)(5) (requiring approval of acquisition of control of a "rail carrier" by "a person that is not a rail carrier but that controls any number of rail carriers"). The Second Circuit's indiscriminate approach in applying FELA conflicts with this established distinction between railroads and their parents.

It also disregards the rulings of other federal agencies with jurisdiction over railroads. Those agencies, too, have concluded that the MTA and similar agencies are not "railroads" and their employees are not "railroad employees" for the purposes of federal statutes governing the rights of "railroad" employees. For example, the Railroad Retirement

Board (RRB) has specifically determined that the employees of the MTA Police Department, such as respondent Greene, are not covered by either the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231 *et seq.*, or the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 *et seq.* See *Employee Service Determination: MTA Police Department* (RRB, May 21, 1998).

The National Mediation Board, which supervises labor relations in the railroad industry under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, similarly has ruled that the MTA and its employees are not covered under the Act, even though the MTA "provides substantial operating subsidies to its constituent" railroads and the "MTA board members serve as members of the boards of the constituent agencies of MTA," including the two railroads that are subject to the RLA (and to FELA as well). See *Application of Int'l Bhd. of Teamsters*, 8 N.M.B. 1, 3-4 (1980). Thus, the Second Circuit's decision to treat the employees of parent companies and State-created regional transportation agencies as employees of "railroads" deviates sharply from an otherwise consistent federal regulatory scheme.

Treating employees of a parent company or State agency as "employees" of a "common carrier by railroad" would introduce dramatic changes in labor relations. The RLA establishes a special collective bargaining regime plus an administrative apparatus headed by the NMB to govern the rights and responsibilities of "employees" of "railroads;" it affords them a right to strike. 45 U.S.C. § 151a. Expanding the universe of "railroad" employees would displace New York State labor policy, which, among other things, subjects police employed by the MTA to special State grievance procedures and prohibits them from striking. See N.Y. Civ. Serv. L. §§ 200 *et seq.* (Taylor Law); N.Y. Workers' Comp. L. § 2(3).

The Second Circuit's decision calls out for review to bring FELA coverage back into line with the rulings of this Court, other circuits, and federal administrative agencies.

## III. An Entity That Owns And Oversees A Railroad May Be Treated As A "Railroad" Under FELA Only When A Claimant Establishes The Elements For "Piercing The Corporate Veil."

This Court frequently has declared that Congress legislates in light of common-law concepts, see, *e.g.*, *Meyer* v. *Holley*, 537 U.S. __ (2003) (slip op. 4-5), and Congress's enactment of FELA is no exception. See *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994) (common-law principles "are entitled to great weight in our analysis" when resolving FELA issues); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 568 (1987) (same).

In *United States* v. *Bestfoods*, 524 U.S. 51, 72 (1998), the Court applied common-law principles of vicarious liability in a case under CERCLA. The Court ruled that, under the "bedrock principle" of limited liability of a parent corporation, a federal statute is presumed not to attribute to the corporate parent the responsibilities imposed on its subsidiary, except when "piercing the corporate veil" is permissible under common-law principles. The Court held that the very acts on which the Second Circuit here relied, "such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures," do not impute the subsidiary's legal burdens to the parent. 524 U.S. at 72.

In the Court's very recent decision in *Meyer*, *supra*, handed down several months after the Second Circuit issued its decision in this case, the Court reaffirmed the common-law principle that is dispositive here: A "corporation's liability may be imputed to the corporation's owner" only when the prerequisites for "piercing of the corporate veil" have been established. 537 U.S. at __ (slip op. 11). The Court explained that a departure from this common-law principle in favor of "unusually strict rules" is appropriate "only where Congress has specified that such was its intent." *Id.* at __ (slip op. 6). There the Court found that neither the

statute nor the legislative history disclosed a congressional intent to make "corporate owners * * * liable for the unlawful acts of a [corporation] simply on the basis that the owner * * * controlled (or had the right to control) the actions of [the corporation]." *Id.* at __ (slip op. 5). The decision below simply cannot stand in the face of this latest ruling reminding lower courts to respect the legal distinction between separate entities.

Indeed, this Court already has applied similar common-law standards in a related railroad context under the Transportation Act, 41 Stat. 456, limiting the circumstances in which "the dominant company" will be "liable for the injuries due to the negligence of the subsidiary company." *Davis* v. *Alexander*, 269 U.S. 114, 117 (1925). Other appellate courts have agreed that common-law standards for piercing the corporate veil must be applied before a parent's relationship with a subsidiary railroad may justify treating the parent as a "railroad" under FELA.[6]

The Second Circuit never denied that the MTA and the LIRR are sufficiently distinct to survive a "veil-piercing" inquiry. Applying New York common law, State appellate courts consistently have refused to pierce the LIRR's corporate veil. See *Noonan* v. *Long Island R.R.*, 551 N.Y.S.2d 232, 232 (App. Div. 1990); *Montez* v. *Metropolitan*

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[6] See, *e.g.*, *Southern Ry. Co.* v. *Crosby*, 201 F.2d 878, 881-82 (4th Cir. 1953) ("dominant [parent] railroad which controls and operates the business of a subsidiary" is subject to FELA, if subsidiary was "little more than a corporate pocket" of the parent); *Thaxton* v. *Norfolk S. Ry. Co.*, 520 S.E.2d 735, 739 (Ga. Ct. App. 1999) (holding company that owned a railroad subsidiary is subject to FELA, if it "dominates" railroad subsidiary).

The ICC and its successor (the STB) use the "sham transaction" test in deciding whether to "pierce the corporate veil" and apply railroad labor-protective provisions to railroads' non-carrier parents and affiliates. *E.g.*, *GWI Switching Services*, 2001 STB LEXIS 656 at *14-*22; *South Kansas & Oklahoma R.R.*, 1992 ICC LEXIS 242 at *3-*8.

*Transp. Auth.*, 350 N.Y.S.2d 665 (App. Div. 1974). It is "settled, as a matter of [New York] law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." *Cusick* v. *Lutheran Med. Ctr.*, 481 N.Y.S.2d 122, 123 (App. Div. 1984).

Since the MTA's role in superintending the affairs of its operating railroad subsidiaries does not justify "piercing of the corporate veil," the Court should grant certiorari for plenary review of the decision below. Alternatively, the Court should grant the MTA's petition, vacate the decision below, and remand for reconsideration in light of *Meyer*.

## IV. The Issues Are Important Because They Affect Other Government-Created Regional Transportation Agencies As Well As Private Corporations That Own Operating Railroads.

The decision below is obviously important to the MTA and the thousands of MTA employees who are not actually employed by one of the MTA's operating railroads but who may now seek access to federal courts to litigate their accident claims under substantive federal law. Pending within the Second Circuit are more than a dozen cases involving FELA claims by MTA employees, most involving auto accidents or "slip and fall" claims.

1. *Other Transportation Agencies*. By disregarding the MTA's status as a "public authority," the Second Circuit also has exposed to FELA suits other regional transportation agencies that oversee commuter railroads within the circuit. Even more broadly, the Second Circuit's decision flashes a green light inviting FELA suits against regional transportation agencies nation-wide that own or coordinate commuter railroads. State legislatures around the country have created agencies similar to the MTA and charged them with responsibility for coordinating regional transportation. This assignment typically includes arranging passenger rail service. Some agencies provide the rail service themselves.

Others, like the MTA, own and oversee separate operating railroad companies (whose own employees are, of course, covered by FELA). Indeed, the Federal Government's own Department of Transportation falls in this category because of its ownership and oversight of Amtrak. See 49 U.S.C. § 24304(d)(1) (1994) (amended 1997) (Secretary of Transportation owns preferred stock equal to funds appropriated to Amtrak); 49 U.S.C. § 24302 (a)(2) (pursuant to which the President has appointed the Secretary as one of seven voting board members of Amtrak). A third group contracts with independent railroad companies (also covered by FELA) to provide the service. Almost two dozen other government-created commuter rail authorities — and the Department of Transportation — would be subject to FELA under the Second Circuit's expansive interpretation. These regional agencies are listed at Pet. App. 49a.

As this case illustrates, FELA is irresistibly attractive to potential claimants seeking to enhance their financial opportunities through litigation. Mere acceptance of workers' compensation benefits may not foreclose a FELA claim. See, *e.g.*, *South Buffalo Ry. Co.*, 344 U.S. at 372-73. A FELA claim, unlike a typical workers' compensation claim, is not subject to a schedule of fixed benefits or a cap on monetary awards and includes potentially unlimited recovery for "pain and suffering" and other elements of alleged damages. See Baker, *Why Congress Should Repeal The Federal Employers' Liability Act of 1908*, 29 HARV. J. LEGIS. 79, 84 (Winter 1992). As a result, employees regard FELA suits "as preferable to workers' compensation acts." 2 LARSON'S WORKERS' COMP. LAW § 2.08, at 2-16 (1999). The Second Circuit's decision invites the employees of other regional rail transit agencies to bring FELA lawuits against them in federal court. Litigation of these claims will tax the limited resources of these public-service agencies.

2. *Parent Corporations*. The Second Circuit's test also applies to any business corporation that owns an operating railroad company and uses its ownership for the

conventional purpose of supervising its subsidiary's affairs. In extending FELA to parents of operating railroads, the court did not distinguish between public and private parents. Indeed, in justifying its conclusion, the court relied exclusively on cases involving commercial railroads and their affiliates.

Moreover, the 1939 amendment to FELA authorizes federal claims against a covered "railroad" not only by workers directly involved in railroading but also by other employees, ***including clerical and supervisory personnel***, whose duties "further or substantially affect transportation." *Reed*, 351 U.S. at 505. The Second Circuit's misguided approach, expanding the number of covered "railroads," thus enormously increases the number of potential FELA claimants and federalizes the accident claims of employees of all the corporate parent companies that own the Nation's passenger and freight railroads.

There are more than 550 different freight and passenger railroads operating in this country potentially affected by the decision below. See U.S. Department of Transportation, Bureau of Transportation Statistics, TRANSPORTATION STATISTICS 2001, Table 1.2. Many of those companies have operations within the Second Circuit or are amenable to suit there. Since State worker-compensation benefits may not bar FELA claims, the ability to pursue federal compensatory damage awards, particularly within the Second Circuit, will prove irresistible to thousands of employees who have not previously been thought to be covered by FELA.

3. *Federal Courts*. Even as Congress actually drafted FELA, covering only employees of "going railroads," the statute places substantial burdens on the courts. In the five years from 1996 to 2000, railroad employees filed over 32,000 FELA suits against the Nation's operating railroads. See *Amicus* Brief of Association of American Railroads in Support of Petition in *Norfolk & Western Ry.* v. *Ayers*, *supra*, at 2 n.5. If left intact, the Second Circuit's decision inevitably will encourage employees of State agencies and

holding companies located in other circuits as well as the Second Circuit to transform their local, work-related accidents into FELA claims subject to federal court jurisdiction. It is not hyperbole to say that the Second Circuit's decision opens the federal court-house door to thousands of employees not properly within the ambit of congressional coverage. Review of that decision is, therefore, important to the Nation's federal courts.

In light of the practical problems posed by the Second Circuit's decision, it is important for this Court to reinstate a bright-line standard for distinguishing those employees who may bring their accident cases into federal court under FELA from those who must pursue traditional State remedies. Only employees of the operating railroad itself — the "going railroad" — fall on the FELA side of the line. Employees of parent corporations and State transportation agencies that own or control railroads that have separate workforces must rely upon their State remedies.

## CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the Court should grant the petition, vacate the decision below, and remand for reconsideration in light of *Meyer* v. *Holley*, 537 U.S. __ (decided January 22, 2003).

Respectfully submitted.

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FEBRUARY 2003

**[DECISION BELOW – REPORTED AT 280 F.3d 224]**

United States Court of Appeals,
Second Circuit.

Sean GREENE, Plaintiff-Appellee,
v.
LONG ISLAND RAILROAD COMPANY, Barbara A. Arias, Thelma Schulman, Defendants,

Metropolitan Transportation Authority, Defendant-Appellant.

**Docket No. 00-9292.**

Argued May 2, 2001.
Decided Feb. 11, 2002.

Before MESKILL and KEARSE, Circuit Judges, and SQUATRITO, District Judge.*

KEARSE, Circuit Judge

Defendant Metropolitan Transportation Authority ("MTA" or the "Authority") appeals pursuant to 28 U.S.C. § 1292(b) from an interlocutory order of the United States District Court for the Eastern District of New York, Leonard D. Wexler, *Judge,* denying its motion for summary judgment dismissing the personal injury claims asserted against it by its employee Sean Greene under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1994) ("FELA" or the "Act"). In an opinion reported at 99 F.Supp.2d 268 (2000), the district court denied the motion on the ground that, as owner and operator of defendant Long Island Railroad Company ("LIRR"), which MTA acknowledges is a railroad

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* Honorable Dominic J. Squatrito, of the United States District Court for the District of Connecticut, sitting by designation.

engaged in interstate commerce, MTA is a "common carrier by railroad" within the meaning of the Act. On appeal, MTA contends that the railroad is "operated" only by LIRR, not MTA, and that the district court's ruling was thus erroneous. For the reasons that follow, we disagree and affirm the order of the district court.

## I. BACKGROUND

The following facts, along with others discussed in Part II.B. below, do not appear to be in dispute. MTA is a public benefit corporation created by the New York State Public Authorities Law ("Public Authorities Law"). *See* N.Y. Pub. Auth. L. §§ 1263(1), 1264(2) (McKinney 1999). The Public Authorities Law describes MTA's responsibilities as including

> the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, *including but not limited to such transportation by railroad,* omnibus, marine and air, in accordance with the provisions of this title.

*Id.* § 1264(1) (emphasis added). With exceptions not pertinent here, MTA is given the power to "acquire ... any transportation facility," *id.* § 1266(1), and, *inter alia,* to "operate, maintain, renovate, improve, ... or repair" such a facility and "lease railroad cars for use in its passenger service," *id.* §§ 1266(2) and (7). MTA may levy and collect fares, and it may establish schedules, standards of operation, and public safety rules and regulations as necessary for the "use and operation of any transportation facility." *Id.* § 1266(3). MTA may exercise these powers itself or it may "cause one or more of its powers ... to be exercised or performed by[ ] one or more wholly owned subsidiary corporations." *Id.* § 1266(5). MTA wholly owns two

subsidiaries that are commuter railroads: LIRR and Metro-North Commuter Railroad Company ("Metro-North").

Prior to 1998, LIRR maintained its own police force. Greene was employed by LIRR as a police officer from April 1991 through December 1997. His duties consisted principally of conducting surveillance at parking lots at railroad stations maintained by LIRR, in order to detect and deter thefts of and robberies from parked vehicles. In 1997, the Public Authorities Law authorized MTA to provide and maintain a police department for all MTA affiliates, including LIRR. *See id.* § 1266-h(1). Pursuant to this provision, MTA consolidated police services effective January 1, 1998, forming the "MTAPD," and all LIRR police officers became MTA employees, *see id.* § 1266-h(2) (initial appointments to MTA police force to be "all incumbent police officers from [LIRR] and/or ... Metro-North"). On that date, as a result, Greene became an MTA employee and was no longer an employee of LIRR. Greene was assigned to MTAPD's Auto Crime Unit; his duties as an MTA police officer continued to consist primarily of surveilling LIRR parking lots.

The present action arises out of a vehicular accident that occurred while Greene was on duty on March 4, 1998. Greene and fellow officer John Wyckoff were dispatched by a radio operator to respond to a report of car theft at the LIRR station in Ronkonkoma, New York. The officers proceeded in a jeep, driven by Wyckoff, which was owned by LIRR ("LIRR jeep"). En route to the Ronkonkoma station, the LIRR jeep collided with a car driven by defendant Barbara Arias and owned by defendant Thelma Schulman. Greene alleges that the collision caused him disabling injuries; in addition to asserting claims against Arias and Schulman, he asserts claims against MTA pursuant to FELA and against LIRR pursuant to FELA and state law. The complaint alleges that MTA was negligent in failing to

provide Greene with safe working conditions, including by failing to equip the jeep with a siren and adequate emergency lights and flashers; in operating the vehicle in such a negligent manner as to cause an accident; and in failing to enact or enforce safety rules for personnel in Greene's workplace.

Following discovery, MTA and LIRR jointly moved for partial summary judgment dismissing the claims asserted against them under FELA. While conceding that LIRR is a railroad engaged in interstate commerce, they argued principally (a) that LIRR could not be held liable under FELA because at the time of the accident it was not Greene's employer, and (b) that MTA could not be held liable under FELA because it is not a common carrier by railroad within the meaning of the Act. MTA argued that LIRR operates its own "transportation facilities" and that MTA's involvement with LIRR is limited to indirect support functions such as "'coordinat[ing] the planning and overall policies of its agencies, approv[ing] operating and capital budgets and performance plans, and monitor[ing] financial and operating activities,'" *Greene v. Long Island R. Co.*, 99 F.Supp.2d at 273 (quoting MTA letter to United States Railroad Retirement Board dated December 17, 1997, at 1) (alterations ours); *see* also MTA's Memorandum of Law in Support of Motion for Reconsideration at 9.

The district court denied the motion. Finding that "it is not the corporate form of the entity that is dispositive" in "determining whether a defendant is a common carrier," 99 F.Supp.2d at 272, the court reviewed both MTA's functions and MTA's public characterizations of its role in railroad operations. The court noted that the legislation creating MTA "charges it with the 'continuance, further development and improvement of commuter transportation and other services related thereto,'" 99 F.Supp.2d at 272 (quoting N.Y. Pub. Auth. L. § 1264(1)), and that

> [t]o these ends, the MTA has broad powers including the power to:
> • acquire transportation facilities;
> • "establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair" any facility acquired;
> • establish and collect fares and tolls;
> • establish standards of operation and rules and regulations regarding the conduct and safety of the public;
> • lease railroad cars for use in passenger service and,
> • "do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement" with MTA.
> N.Y. Pub. Auth. L. § 1266(1)-(8).

99 F.Supp.2d at 272. The court observed that

> MTA refers to itself as the "largest public transportation provider in the Western Hemisphere." CFO's Letter of Transmittal dated March 27, 1997, Comprehensive Annual Financial Report of MTA for year ended December 31, 1997.

99 F.Supp.2d at 272. Further,

> [w]hen describing its functions, the MTA states that it "coordinates the planning and overall policies of its agencies, approves operating and capital budgets and performance plans, and monitors financial and operating activities of its agencies." The MTA also states that it "is responsible for certain cross agency support functions." The MTA characterizes its subsidiary agencies, including its commuter rails as "serv[ing] the public by operating the transportation facilities." Letter dated December 17, 1997 from

> MTA to General Counsel, U.S. Railroad Retirement Board. ...
>
> While the MTA's component units are certainly responsible for providing transportation services, the MTA itself is intimately involved in the management, not only of its subsidiaries' finances, but of their real estate and other assets. Thus, the MTA states that the "careful management" of its real estate assets has included a leaseback transaction for the LIRR Hillside maintenance facility, where LIRR trains are repaired and maintained, which transaction produced approximately $22 million in capital funds for the MTA. Funds so obtained, along with other MTA funds are used, *inter alia,* for repairing and upgrading railroad infrastructure, building new facilities and buying new equipment.
>
> The MTA has significant involvement in the marketing of the transportation services available through its subsidiary and component units. The MTA website refers to all transportation facilities (including the LIRR) as part of the "network" of MTA services. Riders are referred to as "MTA customers." Among other things, the MTA takes credit for "offer[ing] the region efficient, environmentally sound travel alternatives."

99 F.Supp.2d at 273-74. The court concluded that by virtue of its "extensive involvement" in LIRR's activities, MTA "operates" a common carrier according to the plain meaning of that word, and that suit against MTA under FELA is permissible because Greene "is no less employed by a common carrier today than when he performed the same duties when employed by the LIRR." *Id.* at 274.

The court cautioned that its holding that MTA may be sued under FELA is "limited to those employees of MTA who are engaged in the interstate common carrier operations

of its commuter rails," and does not extend to workers who are employed strictly in MTA's intrastate operations or its nonrail operations, such as employees of the New York City Transit Authority or the Triborough Bridge and Tunnel Authority. *Id.* at 275 ("The mere interconnectedness of these entities through MTA does not transform those entities into common carriers engaged in interstate commerce.").

Finding that its denial of summary judgment for MTA "involve[d] a controlling question of law concerning the MTA's status under FELA ... and [that] an immediate appeal from the Order may materially advance the ultimate termination of this litigation," the district court certified the issue of whether MTA is a common carrier for interlocutory appeal. *See* Order of Certification, August 16, 2000 at 1. This Court granted MTA's motion for leave to appeal pursuant to 28 U.S.C. § 1292(b).

## II. DISCUSSION

On appeal, MTA argues that it cannot be considered a "common carrier" for purposes of FELA because, rather than operating a railroad, it is only "involv [ed] in the performance of certain marketing, financial and real estate management functions for [LIRR]." (MTA brief on appeal at 2.) For the reasons that follow, we disagree.

### A. *The Scope of FELA*

FELA, which is "a broad remedial statute" whose objective is "to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer," and which is to be "liberal[ly] constr[ued]" to achieve that objective, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) (internal quotation marks omitted), provides, in part, that

> [e]very common carrier by railroad while engaging in [interstate or foreign] commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51. As amended in 1939, this provision covers

> [a]ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce.

*Id.* "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, 505, 76 S.Ct. 958, 100 L.Ed. 1366 (1956). "Nor are the benefits of the Act limited to those exposed to the special hazards of the railroad industry." *Id.* at 505-06, 76 S.Ct. 958; *see id.* at 503, 506, 76 S.Ct. 958 (clerical employee in charge of filing maintenance- related tracings of railroad's cars, engines, and tracks, *inter alia,* injured when a cracked window pane in her office blew in, was covered by FELA).

FELA defines the term "common carrier" to "include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." *Id.* § 57. The term is not otherwise defined, and most of the pertinent cases construing the applicability of FELA, or of analogous federal statutes, to a given employer have been concerned with whether the

employer was a "carrier," or a "common" carrier, or a "railroad."

In *Wells Fargo v. Taylor,* 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205 (1920), the Supreme Court considered whether Wells Fargo, an express shipping company that had purchased carriage on an unaffiliated railroad, was itself a "common carrier by railroad" within the meaning of FELA. The Court concluded that it was not, because Wells Fargo was not the operator of the railroad:

> In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public,--that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad....

*Id.* at 187-88, 41 S.Ct. 93. In *Edwards v. Pacific Fruit Express Co.,* 390 U.S. 538, 88 S.Ct. 1239, 20 L.Ed.2d 112 (1968), the defendant sued under FELA was a refrigerator car company that owned, maintained, and repaired refrigerator cars that it leased to railroads for transport of perishable products in interstate commerce; it also owned switching tracks to facilitate its repair of such cars. The Court concluded that the company was not covered by FELA, noting that "there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." *Id.* at 540, 88 S.Ct. 1239; *cf. Robinson v. Baltimore & Ohio R. Co.,* 237 U.S. 84, 35 S.Ct. 491, 59 L.Ed. 849 (1915) (porter employed by Pullman Company, which paid his salary and controlled his work on a railroad car that was owned by Pullman but was hauled by an independent railroad was not an employee of the railroad).

In *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911), the Court considered whether the granting of preferential treatment to a customer by Southern Pacific Terminal Co. ("SP Terminal"), an operator of wharfage facilities, was within the jurisdiction of the Interstate Commerce Commission ("ICC") under the Interstate Commerce Act, c. 104, 24 Stat. 379 (1887) (codified, as amended, in various sections of 49 U.S.C.), which prohibited, *inter alia,* undue customer preferences by "railroad[s]." SP Terminal was chartered to construct and maintain wharves and docks for the accommodation of vessels, not to operate a railroad. However, the statute defined the term "railroad" to include "all bridges and ferries used or operated in connection with any railroad," *Southern Pacific Terminal,* 219 U.S. at 523, 31 S.Ct. 279 (internal quotation marks omitted). Moreover, SP Terminal was 99% owned by the Southern Pacific Company, which also owned 99% of several separately and individually incorporated railways; and SP Terminal owned the only track facilities available for movement of railroad cars between ships and the tracks of one of the railroads. The Supreme Court, noting that SP Terminal's property created a "unity of the railroad's lines and the terminal facilities," *id.* at 522, 31 S.Ct. 279, and was "necessary in the transportation or delivery of the interstate and foreign freight transported by the lines of the Southern Pacific system," *id.* at 523, 31 S.Ct. 279 (internal quotation marks omitted), concluded that SP Terminal's operations were within the jurisdiction of the ICC, despite the fact that SP Terminal itself owned no cars, no locomotives, no stock in any of the railroads, and issued no bills of lading. The Court found that one

> important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This

> control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the terminal company have united them into a system of which all are necessary parts, the terminal company as well as the railroad companies ... the terminal company was organized to furnish terminal facilities for the system at the port of Galveston; and ... shipments on the railroad lines from and to points in different states of the Union pass and repass over the docks of the terminal company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation.

*Id.* at 521-22, 31 S.Ct. 279 (internal quotation marks omitted). The Court stated that

> a corporation such as this terminal company, which has competing lines, should not be permitted to defeat the jurisdiction of th[e] Commission by showing that it is not in fact owned by any railroad company.... The terminal company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, though the organization of separate corporations, to exempt all of their terminals from [the ICC's] regulating authority.

*Id.* at 522, 31 S.Ct. 279 (internal quotation marks omitted). The Court rejected the defendants' contentions that the parent company and each of the subsidiaries must be viewed

independently of one another merely because they were separately incorporated:

> The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single. In the ordinance of the city of Galveston, in the act of 1899, of the legislature of the state, and in public circulars and in the lease of [the favored customer], it is the system which is dealt with, and not its separate links. And, we have seen, the terminal facilities which the Terminal Company was authorized to maintain were for the system, not for the corporate elements considered separately.

*Id.* at 523-24, 31 S.Ct. 279.

In *United States v. Union Stock Yard & Transit Co.*, 226 U.S. 286, 33 S.Ct. 83, 57 L.Ed. 226 (1912), an action to enjoin various violations of the Interstate Commerce Act, the Court considered whether the Union Stock Yard & Transit Company of Chicago ("Stock Yard Company"), organized to maintain a stockyard, was a railroad within the meaning of that statute. Stock Yard Company, more than 90% of whose stock was owned by a holding company, Chicago Junction Railways & Union Stock Yards Company, was authorized to operate normal stockyard facilities for loading, unloading, and caring for freight. It was also authorized to own and operate a railroad system, moving rail cars to and from trunk lines for transportation to and from points outside of the

state. At some point, Stock Yard Company leased the latter aspect of the business to an entity that eventually became known as Chicago Junction Railway Company ("Junction Company"), nearly all of whose stock was owned by the same holding company that owned Stock Yard Company. Junction Company thereafter performed the railroad services and paid Stock Yard Company "two-thirds of the profits received by the Junction Company for performing the service in connection with the railroad transportation." *Id.* at 303, 33 S.Ct. 83. That "joint service [then took] the place of the single service formerly rendered by the Stock Yard Company." *Id.* "In view of this continuity of operation, the manner of compensation and the performance of services in connection with interstate transportation by railroads," *id.*, the Supreme Court concluded that the two companies,

> because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act.... [T]he Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control,

*id.* at 306, 33 S.Ct. 83.

In *United States v. Brooklyn Eastern District Terminal,* 249 U.S. 296, 39 S.Ct. 283, 63 L.Ed. 613 (1919), the Court considered whether the Brooklyn Eastern District Terminal ("Terminal" or "Brooklyn Terminal"), chartered not as a railroad but as a navigation corporation, was a railroad within the meaning of the Hours of Service Act, 45 U.S.C. § 61 *et seq., repealed by* Pub. L. No. 103-272, § 7(b), 108 Stat.

1379 (1994), which prohibited any "common carrier operating a railroad" in interstate commerce from requiring or permitting an employee to remain on duty for more than 16 consecutive hours. In connection with its business of transporting merchandise on boats in New York harbor and adjacent waters, Brooklyn Terminal, under individual contracts with 10 interstate railroads and several steamship companies, operated a freight station at which it received freight for transport to its Brooklyn docks. The Court stated that the precise question before it was

> whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer and exempts the Terminal, because it is not a common carrier.

249 U.S. at 305, 39 S.Ct. 283. The Court concluded that although Brooklyn Terminal did not hold itself out as a common carrier, did not itself own the railroad cars that traveled over its tracks, and had tracks that covered only a short route, it must be considered a common carrier by railroad given that the services it rendered were public in nature and of a kind ordinarily rendered by a common carrier:

> In no respect ... d[id] the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another.

*Id.* at 306-07, 39 S.Ct. 283.

In *United States v. State of California,* 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936), the Court considered whether

the State of California, in the operation of its State Belt Railroad to serve some 175 industrial plants, was a "common" carrier within the meaning of the Safety Appliance Act, 45 U.S.C. § 1 *et seq., repealed by* Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994), which prohibited such companies from using rail cars with defective coupling equipment. Though the State maintained that it was not a "common" carrier because it, *inter alia,* maintained no freight station and issued no bills of lading, the Court concluded that

> [a]ll the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad. They are the receipt and transportation, for the public, for hire, of cars moving in interstate commerce.... Its service, involving as it does the transportation of all carload freight moving in interstate commerce between the industries concerned and all railroad and steamship lines reaching the port, is of the same character, though wider in scope, as that held to be common carriage by rail in interstate commerce in the *Brooklyn Terminal* and the *Union Stockyards* cases. They abundantly support the conclusion that such is the service rendered by the state in the present case....

297 U.S. at 182-83, 56 S.Ct. 421.

The matter of intra-corporate-family responsibility, discussed in *Southern Pacific Terminal,* 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310, and *Union Stock Yard & Transit,* 226 U.S. 286, 33 S.Ct. 83, 57 L.Ed. 226, was revisited in *United States v. Bestfoods,* 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), in which the United States brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.,* against a parent corporation for the costs of cleaning up industrial waste generated at a chemical plant owned by its subsidiary. CERCLA imposes liability on

"any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(2). The question before the Supreme Court in *Bestfoods* was "whether a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may, *without more,* be held liable as an operator of a polluting facility owned or operated by the subsidiary." 524 U.S. at 55, 118 S.Ct. 1876 (emphasis added). The Court answered that precise question in the negative, noting that although the parent and subsidiary had many of the same officers and directors, "courts generally presume that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary," *id.* at 69, 118 S.Ct. 1876 (other internal quotation marks omitted). Thus, liability under a statute that does not itself pierce the corporate veil may not be imposed on a parent corporation for the acts of its subsidiary corporation based solely on the parent's 100% ownership of the subsidiary and active participation in or control of the subsidiary's board of directors. *See id.* at 68, 118 S.Ct. 1876. The Court pointed out, however, that "a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility." *Id.* at 55, 118 S.Ct. 1876. "[A] parent can be held directly liable when the parent operates the facility in the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture." *Id.* at 71, 118 S.Ct. 1876.

Several of these cases were synthesized in *Lone Star Steel Co. v. McGee,* 380 F.2d 640, 646-48 (5th Cir.), *cert. denied,* 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967), in which the Fifth Circuit considered whether Lone Star, a steel company, was a common carrier by railroad within the meaning of FELA and the Safety Appliance Act. Lone Star did not dispute that it was a carrier by rail; it had a rail line within its plant area and handled incoming shipments for

other companies that had facilities on its property. But it contended that it was not a "common" carrier, given that it made no direct charge by way of tariffs and received no direct freight revenues for any of its rail services. However, Lone Star was virtually the sole stockholder of T & N, a railroad company that concededly was a common carrier. T & N, in addition to charging for its own services, charged for the rail services performed by Lone Star; and in a recent 10-year period, T & N had paid Lone Star $2 million in dividends.

After reviewing the circumstances and analyses in cases such as *State of California,* 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567, *Brooklyn Eastern District Terminal,* 249 U.S. 296, 39 S.Ct. 283, 63 L.Ed. 613, *Union Stock Yard & Transit,* 226 U.S. 286, 33 S.Ct. 83, 57 L.Ed. 226, and *Southern Pacific Terminal,* 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310, the *Lone Star* court found four considerations to be

> of prime importance in determining whether a particular entity is a common carrier. First--actual performance of rail service, second--the service being performed is part of the total rail service contracted for by a member of the public, third--the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth--remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad.

380 F.2d at 647. Applying those criteria to the circumstances before it, the court concluded that Lone Star was a common carrier:

> Unquestionably, Lone Star performs rail services and such services are a part of the total rail transportation contracted for and required by the industries located on its plant site. While it does not perform these services under contract with T & N, it certainly is an integral part of the T & N system of interstate rail transportation. And finally, even though it does not receive money in the form of direct transportation charges from T & N or from the industries serviced, it is for all practical purposes the sole owner of T & N. It is closely allied with T & N, their operations are interwoven, and therefore it receives in the form of dividends a part of the rate charged the industries by T & N. It has been suggested that we cannot ignore the legal individuality of Lone Star and T & N and therefore, we are precluded from attaching any significance to the fact that Lone Star is essentially the sole stockholder of T & N and consequently receives dividends therefrom. It is contended that stock ownership does not make the two companies one. While we agree with this proposition, we do not think it is controlling because the record does not present a case of mere stock ownership. Instead the record reflects that the operations of the two are highly integrated and mutually dependent.

*Id.* at 647-48. The court concluded that

> [i]n light of the rail services Lone Star has performed, the fact that such services are actually rendered in fulfillment of T & N's obligations as a carrier, and giving consideration to the facts disclosed in the record revealing the close connection between the two companies and their mutual dependence on each other, ... both Lone Star and T & N are operating, jointly, a railroad system which constitutes each of them a common carrier.

*Id.* at 648-49.

In sum, the above cases reveal that companies that have no corporate affiliation or agency relationship with a railroad and merely supply the railroad with equipment such as refrigeration cars, or merely use the railroads to provide services such as courier deliveries for third persons, are not "carriers" within the meaning of FELA. *See, e.g., Edwards v. Pacific Fruit Express Co.,* 390 U.S. at 540, 88 S.Ct. 1239; *Wells Fargo v. Taylor,* 254 U.S. at 187-88, 41 S.Ct. 93. On the other hand, companies in nonrailroad businesses that have rail lines and provide rail carriage ancillary to those businesses are "common" carriers by rail when they constitute necessary links to railroads that are common carriers. *See, e.g., State of California,* 297 U.S. at 182-83, 56 S.Ct. 421; *Brooklyn Eastern District Terminal,* 249 U.S. at 305-07, 39 S.Ct. 283; *Lone Star Steel Co. v. McGee,* 380 F.2d at 647-49. Further, a company that has neither its own rolling stock nor corporate stock in railroad companies may be considered a "railroad" if it is part of an integrated corporate family that includes common carriers by railroad and if it constitutes a necessary link to those carriers. *See, e.g., Southern Pacific Terminal,* 219 U.S. at 521-24, 31 S.Ct. 279; *see also Union Stock Yard & Transit,* 226 U.S. at 303-06, 33 S.Ct. 83. Even the fact that a company "conducts [such] operations, not as an integral part of a single railroad system but wholly as an agent for one or several," does not exempt it from the status of common carrier. *Brooklyn Eastern District Terminal,* 249 U.S. at 305, 39 S.Ct. 283. And while corporate ownership of a subsidiary and overlapping offices and directorates are not, without more, sufficient to impose liability on the parent for conduct of the subsidiary under a statute that does not itself pierce the corporate veil, the parent may nonetheless be liable for operations of the subsidiary in which the parent itself, wearing its parenting hat, participates. *See, e.g., Bestfoods,* 524 U.S. at 55, 68-71, 118 S.Ct. 1876.

Bearing in mind the above principles and MTA's acknowledgement that LIRR is an interstate common carrier by railroad, and focusing on FELA's definition of "common carrier," which "include[s] ... corporations charged with the duty of the management and operation of the business of a common carrier," 45 U.S.C. § 57, we turn to the question of whether MTA is within the scope of FELA as a manager or operator of LIRR's business.

B. *MTA's Participation in LIRR's Business*

The Public Authorities Law imposes on MTA the responsibility for

> the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, *including but not limited to such transportation by railroad.*

N.Y. Pub. Auth. L. § 1264(1) (emphasis added). To that end, MTA is given special powers, including the power to "acquire ... any transportation facility," *id.* § 1266(1); to "operate, maintain, renovate, improve ... or repair" such a facility, *id.* § 1266(2); to "levy and collect ... fares ... and other fees," *id.* § 1266(3); and to establish schedules, standards of operation, and public safety rules and regulations as necessary for "use and operation of any transportation facility," *id.* § 1266(4). MTA is authorized to "cause any one or more of its powers ... to be exercised or performed by [ ] one or more wholly owned subsidiary corporations," *id.* § 1266(5); it may "transfer to or from" such a subsidiary "any moneys, real property, or other property," *id.;* and it may apply for government grants "to meet capital or operating expenses" for such a subsidiary. *id.* § 1266(6). The "[A]uthority may lease railroad cars for use in its passenger service...." *Id.* § 1266(7).

For the rail, bus, subway, bridge, tunnel, marine, and air operations "within the metropolitan commuter transportation district," MTA is "to develop and implement a unified mass transportation policy." *Id.* § 1264(1). In accordance with its legislative mandate, MTA encompasses, as subsidiaries or as components for which MTA is financially accountable, many transportation agencies, including Metro-North, the New York City Transit Authority, the Staten Island Rapid Transit Operating Authority, the Metropolitan Suburban Bus Authority, and the Triborough Bridge and Tunnel Authority. (*See* MTA 1997 Annual Report, Notes to Combined Financial Statements, at 63.) MTA provides centralized services to these agencies, in the areas discussed below with respect to LIRR.

In 1966, MTA acquired LIRR as a subsidiary. The board of directors of MTA is also the board of directors of LIRR, *see id.* § 1266(5), and the MTA chairman determines who will be president of LIRR. MTA is not, however, simply a holding company or a stockholder content to manage LIRR through overlapping formal corporate governance. Rather, the record reveals that MTA, using nonoverlapping personnel employed at its own headquarters ("MTAHQ"), participates directly and extensively in, *inter alia,* the financial side of LIRR's operations. MTA's 1997 Annual Report, for example, states that "Metropolitan Transportation Authority Headquarters ('MTAHQ') provides support in budget, cash management, finance, legal, real estate, treasury, risk management, and other areas, to ... [t]he Long Island Rail Road Company ('LIRR')...." (MTA 1997 Annual Report, Letter of Deputy Executive Director and Chief Financial Officer, at 50.)

MTA's Director of Labor Relations and head of human resources, Gary J. Dellaverson, described in his deposition several aspects of MTA's participation in the financial side of LIRR's operations. For example, MTA is involved in

advertising and marketing for LIRR (Deposition of Gary J. Dellaverson ("Dellaverson Dep."), at 41, 64), and handles revenues generated by the placement of advertisements on LIRR property (*id.* at 41). MTA also participates directly in LIRR's budgeting, providing supervision with respect to cash management. "As cash management suggests," this means "managing cash flow of the entity." (*Id.* at 33.) Thus, "MTA headquarters' budgeting function for Long Island Railroad would and does both establish expenditure targets, make revenue projections and in conjunction with the Railroad, prepare annual budgets and periodic revisions." (*Id.* at 30). In sum, "MTA approves the Long Island Railroad's budget." (*Id.* at 31; *see also id.* at 32 ("I would say that [MTAHQ employees] probably assist in virtually every budgeting function and lead in the area that I described.").)

Further, MTA itself raises funds to subsidize LIRR operations. LIRR revenues generally do not rise to the level of its expenses. LIRR does not, however, borrow money or issue debt in its own name. (*See* Dellaverson Dep. at 35.) Rather, to subsidize LIRR operations, debt is issued by MTA, which pledges LIRR property as collateral. For example,

> *MTA ... Commuter Facilities Revenue Bonds* ... are obligations payable solely from, and secured by, a pledge of the gross operating revenues and the physical assets of LIRR and [Metro-North] for Commuter Facilities Revenue Bonds.... In accordance with the bond resolutions, sufficient funds to meet the maximum annual debt service requirements are held in reserve accounts maintained by the trustee as security for payment of the bonds. The remaining revenues after debt service are available to meet the operating needs of the agencies.

(MTA 1993 Annual Report at 71.) Thus, the moneys raised for LIRR through the issuance of debt are administered by

MTA; and MTA determines when portions of those funds will be made available to LIRR (*see* Dellaverson Dep. at 34). In sum, Dellaverson testified, it is fair to say that MTA looks at LIRR's income from passenger fares and vendor fees, determines the extent of the operational shortfall, and provides LIRR with the difference by way of subsidy. (*See id.* at 33-34.) Since LIRR "is not a self-sustaining enterprise" (*id.*), LIRR could not remain in the commuter railroad business in the absence of subsidies such as those provided by MTA.

In addition, "[c]ertain common functions between the operating agencies are provided by [MTA] headquarters." (*Id.* at 35.) These include legal matters with respect to LIRR real estate (*id.*); and some of those transactions on their face reveal the intertwining of MTA in the business of LIRR. For example, MTA's 1997 Annual Report described one $300,000-odd real estate transaction, in pertinent part, as follows:

> On March 31, 1997, MTAHQ entered into a lease/leaseback transaction with a third party whereby MTAHQ leased LIRR's Hillside maintenance facility.... The facility was subsequently subleased back to MTAHQ as a capital lease, and sub-subleased by MTAHQ to LIRR. The facility is included in LIRR's financial statements....

(MTA 1997 Annual Report at 80.)

Further, MTA is directly involved in LIRR's negotiations with labor unions. Dellaverson, employed at MTAHQ, is director of labor relations for MTA, has "responsibility for labor policy at the corporate level," and is the "chief labor negotiator for the Authority." (Dellaverson Dep. at 6). "[A]s part of [his] duties as director of labor relations for MTA" (*id.* at 14), Dellaverson normally had discussions with labor leaders with respect to anticipated collective bargaining

agreements of LIRR (*see id.* at 15). He personally participated in negotiating, or at least was consulted and gave advice on, the majority of the major labor contracts entered into by LIRR. (*See id.* at 15-16.)

MTA's integral role in the business side of LIRR operations is amply reflected in MTA's own public statements. The MTA Annual Report for 1993, for example, described what MTA referred to as its "Fare Deal":

> Fare Deal is a vision of public transportation's possibilities--a business strategy that will change the relationship between the MTA and its customers in order to increase ridership and pay for improvement in our facilities and rolling stock.

(MTA 1993 Annual Report, Letter of MTA Chairman and Chief Executive Officer; *see Webster's New International Dictionary* 2163 (2d ed. 1957) (defining "rolling stock" as "[t]he locomotives, motorcars, passenger cars (or coaches), freight cars ..., and all other wheeled vehicles, etc., running or capable of running on the tracks or rails.").) The 1993 report stated that

> [t]he MTA delivered on Fare Deal throughout 1993. We found out what our customers wanted and gave it to them whenever and wherever we could
>
> We revised policies. A previous-month's commuter rail ticket can now be used on the first workday of the next month, showing regular customers we trust them and value their business....
>
> .... And we gave suburban rail customers more vans and small buses to take them from their homes to the station.

(MTA 1993 Annual Report, Letter of MTA Chairman and Chief Executive Officer.) The report also described, *inter alia,* MTA capital projects for the improvement of LIRR facilities:

> **Fare Deal Means Infrastructure**

> .... In the transportation business, there is no standing still when it comes to maintaining infrastructure--you either move forward or slide backward.
>
> ....
>
> Capital projects on the railroads included four completions in the LIRR's huge, multiyear project to rebuild its portion of Penn Station as a customer-friendly facility: a ticket-holders' waiting room, central corridor, vaulted concourse ceiling, and LIRR Police office.

(MTA 1993 Annual Report at 11.) Again referring to these refurbishments, MTA stated

> **Fare Deal Is Infrastructure**
>
> One of Fare Deal's pillars is dedicated to maintaining infrastructure, and 1993 saw work on several major LIRR projects[, including] a new and more visible LIRR Police office.
>
> . . . . .
>
> Building of another sort took place at our freight operation, which became a success story in 1993. The LIRR has been making tremendous efforts to move freight around the island.... As a result, freight contributed a significant positive cash flow for the first time in decades.
>
> Fare Deal's focus on customers was basic to everything the LIRR did in 1993-- whether it involved infrastructure, safety, freight, mechanical reliability, on-time performance, or inter-modal travel. Finding ways to satisfy all kinds of customer needs was the reason for the success of the MTA Long Island Rail Road during the year.

(*Id.* at 22.) MTA stated that "[t]he Fare Deal promise of seamless travel moved closer to realization on Long Island." (*Id.* at 23.) In October 1998, MTA published an "ingenious" map entitled "MTA Railroads," which "placed the railroads

on the backside of a subway map with [points of] intermodal transfer [e.g., from subway to train] ... being highlighted." (Dellaverson Dep. at 62- 63.)

Finally, in addition to its hands-on participation in the budgeting, capital raising, marketing, advertising, real estate, risk management, and labor relations aspects of LIRR operations--and of particular relevance to the present case--MTA participates in LIRR's operations by providing security personnel for LIRR station parking lots. Although MTA argued in the district court that MTA police officers are not engaged in the "actual performance of rail service" by LIRR (MTA's Memorandum of Law in Support of Motion for Reconsideration at 9), there can be no question that the work of the MTAPD Auto Crime Unit at LIRR parking lots, to which Greene was assigned, is in "furtherance of" LIRR's railroad business within the meaning of FELA, 45 U.S.C. § 51. Commuters who drive to LIRR stations require safe places in which to leave their cars, and the presence of such police officers is meant to provide both security and reassurance:

> [A]ll the MTA police forces were targeting their customers' fears: the LIRR Police successfully thwarted car theft in railroad parking lots....

(MTA 1994 Annual Report at 8).

Further, it is clear that prior to the consolidation, the LIRR police officers were covered by FELA. (*See* Dellaverson Dep. at 83.) Indeed, Dellaverson testified that one of the benefits that MTA perceived it would receive as a result of the consolidation of the security forces as employees of MTAHQ was "having the workers out from under the FELA system." (*Id.* at 84; *see also* Supplemental Affidavit of Gary J. Dellaverson dated June 1, 2000, ¶ 2 (denying that removal of the LIRR police force from the coverage of FELA was "the purpose" of the consolidation, though it "was well understood to be one of the many results").)

And with respect to MTA's consolidated police force, as with respect to other financial, personnel, and asset-management matters such as those described above, the record reveals an intermingling of MTA and LIRR functions. Although employed by MTA, the officers use LIRR vehicles. And while the salaries of MTA policemen who were formerly LIRR employees are funded by MTA, "[t]he physical creation of the check itself" is done by the "Long Island Railroad Treasury Department for the employees up to the rank of captain." (Dellaverson Dep. at 101.)

In sum, MTA's relationship to LIRR is not limited to its status as stockholder of a subsidiary. While LIRR's own employees are responsible for running the trains and collecting the fares, there is more to "the management and operation of the business," 45 U.S.C. § 51, of a railroad than operation of the transportation facilities themselves. MTA, as described above, is directly and integrally involved in essential business aspects of LIRR operations, as well as in providing police services that are directly in furtherance as LIRR's business as a railroad. MTA has not called to our attention any case, and we are aware of none, in which a company so integrally involved in the essential business aspects of the railroad's operations, and was the employer of the person injured in the course of employment that was designed to advance the railroad's business, was ruled not an employer within the meaning of FELA.

## CONCLUSION

The district court correctly ruled that, with respect to the police officers whom MTA employs to provide security for LIRR railroad parking lots, MTA "operates" an "interstate common carrier by railroad" within the meaning of FELA. We have considered all of MTA's arguments for the contrary conclusion and have found them unpersuasive. We of course express no view as to whether Greene was injured by reason

of negligence on the part of any MTA officers, agents, or employees, or by reason of any defect or insufficiency, due to MTA's negligence, in its equipment.

The order of the district court denying MTA's motion for partial summary judgment dismissing Greene's FELA claims against MTA is affirmed.

**[ORDER DENYING MTA'S MOTION TO VACATE AND REMAND ON SOVEREIGN IMMUNITY GROUNDS]**
**[UNREPORTED]**

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**MOTION INFORMATION STATEMENT**

FILED
U.S. COURT OF APPEALS
SECOND CIRCUIT

JUN 14 2002

Roseann B. MacKechnie,
CLERK

Docket Number(s): 00-9292
Motion for: Panel Decision to be Vacated.

Set forth below precise, complete statement of relief sought: Metropolitan Transportation Authority ("MTA") seeks to vacate the Court's opinion of 2/11/02 and to have the case remanded with instructions to dismiss for lack of subject matter jurisdiction, pursuant to the Eleventh Amendment of the U.S. Constitution.

**MOVING PARTY:** Metropolitan Transportation Authority

**OPPOSING PARTY:** Sean Greene

Caption [use short title]

Sean Greene,

Plaintiff-Appellee,

-against-

Metropolitan Transportation Authority,

Defendant-Appellant.

□ Plaintiff ■ Defendant
■ Appellant/Petitioner □ Appellee/ Respondent

**MOVING ATTORNEY:** Jeffrey Glekel, Esq.

[name of attorney, with firm, address, phone number, and email]

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**OPPOSING ATTORNEY:** Michael Flynn, Esq.

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Court-Judge/Agency appealed from: N/A

Please check appropriate boxes:

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:**

Has consent of opposing counsel:
A. been sought? □ Yes ■ No
B. been obtained? □ Yes ■ No

Has request for relief been made below?
□ Yes □ No

Has this relief been previously sought in this Court?
□ Yes □ No

Is oral argument requested?
□ Yes ■ No

Requested return date and explanation of

(requests for oral argument will not necessarily be granted)

emergency: _____

Has argument date of appeal been set: □ Yes □ No
If yes, enter date: N/A

Signature of Moving Attorney:
/s/ Jeffrey Glekel Date: 6/14/02

Has service been effected? ■ Yes □ No

FILED
U.S. COURT OF APPEALS
SECOND CIRCUIT

JAN 21 2003

Roseann B. MacKechnie,
CLERK

**ORDER**

Before: Hon. Thomas J. Meskill, Hon. Amalya L. Kearse, *Circuit Judges*, Hon. Dominic J. Squatrito*, *District Judge*
IT IS HEREBY ORDERED that the motion is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by /s/ Arthur M. Heller
Arthur M. Heller, Motions Staff Attorney

* The Honorable Dominic J. Squatrito of the United States District Court for the District of Connecticut, sitting by designation.

**[DISTRICT COURT DECISION]**
**[REPORTED AT 99 F. SUPP.2d 268]**

United States District Court,
E.D. New York.

Sean GREENE, Plaintiff,
v.
LONG ISLAND RAILROAD COMPANY, Barbara A. Arias, Thelma Schulman and Metropolitan Transportation Authority, Defendants.

**No. CV 98-4316.**

June 2, 2000.

*MEMORANDUM AND ORDER*

WEXLER, District Judge.

This is a case brought pursuant to, *inter alia,* the Federal Employers Liability Act, 45 U.S.C. § 51 ("FELA"). Plaintiff Sean Greene ("Plaintiff") is a police officer who, at the time of his alleged injury, was employed by the Metropolitan Transit Authority ("MTA"). Plaintiff alleges that he suffered an on the job injury when he was a passenger in a Jeep used as a surveillance vehicle to patrol a Long Island Railroad ("LIRR") station.

Presently before the court is the motion of defendants MTA and LIRR for summary judgment. MTA that argues it cannot be liable under FELA because it is not a common carrier within the meaning of the statute. While the LIRR concedes that it is a common carrier, it seeks summary judgment on the ground that it was neither Plaintiff's employer nor was Plaintiff a "borrowed servant" of the LIRR at the time of the injury.

As discussed below, the court holds, reluctantly, that the MTA is a common carrier and, consequently, that Plaintiff may seek recovery pursuant to FELA for his on the job injury. The court's reluctance comes not from any sense that the common carrier question is close. It arises, instead, from the court's conviction that FELA's liability standard regarding railroad workers injured on the job is one that has become outmoded.

In a time when other workers, including those involved in far more hazardous situations, are covered by a comprehensive scheme of workers' compensation benefits, it is archaic and unwarranted for railroad workers to be entitled to a different standard that takes them outside of the realm of the typical employee. Municipal police officers and firefighters are engaged in professions that daily subject them to situations far more dangerous than that of the typical railroad worker. Yet, if these individuals, who put their lives at peril every day, are injured on the job, they are covered by workers compensation benefits.

Each and every railroad worker, on the other hand, from the ticket taker to the administrative office worker, may collect damages under FELA, for an on the job injury. In such cases, the railroad employee is entitled to recover by showing that their injury is attributable to the negligence, however slight, of their employer. *See Williams v. Long Island Railroad Co.,* 196 F.3d 402, 406-07 (2d Cir.1999).

While a statutory scheme aimed at protecting railroad workers from the "physical dangers of railroading" may have been necessary in 1908, when FELA was passed, that is no longer the case. In the absence of a change in the statute, however, this court is powerless to carve out exceptions to the Supreme Court's broad and longstanding definition of what constitutes a common carrier subject to FELA--a

definition that, in this court's view, clearly encompasses the interstate operations of the MTA.

*BACKGROUND*

I. *The Parties and the Accident*

As noted above, Plaintiff was, at the time of his injury, a police officer employed by the MTA. The MTA is a public benefit corporation created pursuant to the Public Authorities Law of the Sate of New York. *See* N.Y. Pub. Auth. L. § 1264. The LIRR, which also exists pursuant to the New York State Public Authorities Law, is one of the wholly owned commuter railroad subsidiaries of the MTA.

Prior to 1997, the LIRR maintained its own police force. Beginning in 1997, New York law empowered the MTA to provide and maintain an MTA police force. LIRR police officers like Plaintiff, were, beginning in 1998, appointed to the newly established MTA police force. Thus, as of March4, 1998, at the time of the accident forming the basis of Plaintiff's complaint, Plaintiff became an employee of the MTA and was no longer employed by the LIRR.

At the time of the accident Plaintiff was riding with his partner, police officer Wyckoff, in an unmarked Jeep used for surveillance purposes by MTA police officers assigned to the LIRR. Wyckoff and Plaintiff were responding to a call regarding auto theft at the Ronkonkoma, New York LIRR station. En route, the Jeep collided with a car driven by defendant Barbara Arias and owned by defendant Thelma Schulman. Plaintiff seeks damages as compensation for the injuries allegedly suffered as a result of this accident.

II. *Plaintiff's Complaint and Defendants' Motion*

Plaintiff's theory of recovery supporting federal jurisdiction is a claim brought pursuant to FELA. All other claims sound in common law negligence.

Defendants MTA and LIRR seek summary judgment on the FELA cause of action. MTA claims that it is not a proper defendant under FELA because it is not a common carrier within the meaning of the statute. LIRR, while conceding that its employees are subject to FELA, argues that it is not a proper defendant here because it was not Plaintiff's employer at the time of the accident and Plaintiff was not a "borrowed servant" sufficient to invoke FELA. The court considers the merits of the motion below.

*DISCUSSION*

I. *Legal Principles*

The Federal Employers' Liability Act imposes liability upon common carriers by railroad for the injury or death of railroad employees that results, in whole or in part, from the railroad's negligence or that of its employees. 45 U.S.C. § 51. *See Edwards v. Pacific Fruit Express Co.,* 390 U.S. 538, 538, 88 S.Ct. 1239, 20 L.Ed.2d 112 (1968). FELA was enacted early in the last century to protect railroad employees from the physical dangers of railroading. Thus, the statute has been described as a "federal remedy" that shifts part of the "human overhead" costs from employees to employers. *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 542, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994). As stated by Justice Douglas in 1949, the FELA was enacted to "put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Wilkerson v. McCarthy,* 336 U.S. 53, 68, 69 S.Ct. 413, 93 L.Ed. 497 (1949) (Douglas, J., concurring).

By its express terms, FELA applies only to "common carriers." *See* 45 U.S.C. § 51; *Chaneyfield v. City of New York,* 525 F.2d 1333, 1336 (2d Cir.1975). The Supreme Court has construed this term simply, to mean "one who operates a railroad as a means of carrying for the public ...." *Pacific Express,* 390 U.S. at 540, 88 S.Ct. 1239, quoting, *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 187-88, 41 S.Ct. 93, 65 L.Ed. 205 (1920); *see also Lone Star Steel Company v. McGee,* 380 F.2d 640, 643 (5th Cir.1967) ("common carrier ... holds himself out to the public as engaged in the business of transportation of person or property from place to place for compensation, offering his services to the public generally"), quoting, *Kelly v. General Elec. Co.,* 110 F.Supp. 4, 6 (E.D.Pa.), *aff'd,* 204 F.2d 692 (3d Cir.1953).

Where common carrier status is not found, it is generally because the business in which the entity is engaged is something other than the business of offering to transport goods or passengers by rail. For example, in *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205 (1920), the Supreme Court held that the defendant express messenger service company was not a common carrier. Thus, although the plaintiff-employee was riding in an express car provided by the railroad at the time of his injury, the company employing plaintiff was not in the business of providing rail service as a means of carrying for the public and was therefore not a common carrier within the meaning of FELA. *Wells Fargo,* 254 U.S. at 187-88, 41 S.Ct. 93; *see also Robinson v. Baltimore & Ohio R. Co.,* 237 U.S. 84, 94, 35 S.Ct. 491, 59 L.Ed. 849 (1915) (Pullman car porter was neither a railroad employee nor an employee of a common carrier).

Similarly, in *Edwards v. Pacific Fruit Express Co.,* 390 U.S. 538, 88 S.Ct. 1239, 20 L.Ed.2d 112 (1968), the Supreme Court held that an employee of a company that owned and leased refrigerated cars to railroads was not covered by

FELA. There, despite the fact that the plaintiff was injured while on a railroad, he was not covered by FELA because his employer was not engaged in the business of offering to carry goods or passengers by rail and was, therefore, not a common carrier. *Edwards,* 390 U.S. at 543, 88 S.Ct. 1239.

In *Edwards,* the Supreme Court stressed that an entity is subject to FELA only if it operates a going railroad and FELA was never intended to cover those whose "activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." *Edwards,* 390 U.S. at 540, 88 S.Ct. 1239.[1]

When determining whether a defendant is a common carrier, it is not the corporate form of the entity that is dispositive. Instead, courts look to the actual operations of the entity to determine whether it is operating as a common carrier. *See United States v. State of California,* 297 U.S. 175, 181-82, 56 S.Ct. 421, 80 L.Ed. 567 (1936) (common carrier status under the Safety Appliance Act depends not upon "corporate character or declared purposes, but upon what it does"), quoting, *United States v. Brooklyn Eastern Dist. Term.,* 249 U.S. 296, 304, 39 S.Ct. 283, 63 L.Ed. 613 (1919) (holding that freight terminal was a common carrier for purposes of the Hours of Service Act).

With these principles in mind, the court turns to consider whether the MTA is a common carrier by railroad that is subject to FELA.

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[1] In addition to common carrier status, a defendant must be engaged in interstate commerce to be subject to FELA. Thus, companies operating traditional local street railways are not within the scope of FELA. *See Washington Ry. & Elec. Co. v. Scala,* 244 U.S. 630, 637-38, 37 S.Ct. 654, 61 L.Ed. 1360 (1917).

II. *The Purpose, Structure and Functioning of the MTA*

A. *Purpose of the MTA*

As noted above, the MTA is a public benefit corporation created pursuant to the Public Authorities Law of the State of New York. *See* N.Y. Pub. Auth. L. § 1264. MTA refers to itself as the "largest public transportation provider in the Western Hemisphere." CFO's Letter of Transmittal dated March 27, 1997, Comprehensive Annual Financial Report of MTA for year ended December 31, 1997, annexed as Exhibit B to Declaration of Melissa L. Weiss in Support of Motion for Summary Judgment (hereinafter "Weiss Decl.").

The legislation pursuant to which the MTA was created charges it with the "continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter district." N.Y. Pub. Auth. L. § 1264(1). To these ends, the MTA has broad powers including the power to:

. acquire transportation facilities;

. "establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair" any facility acquired;

. establish and collect fares and tolls;

. establish standards of operation and rules and regulations regarding the conduct and safety of the public;

. lease railroad cars for use in passenger service and,

. "do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement" with MTA.

N.Y. Pub. Auth. L. § 1266(1)-(8).

B. *MTA's Management and Structure*

The MTA is governed by a board whose members are chosen by the Governor of the State of New York, the Mayor of New York City and executives of the counties served by the MTA. Common directors serve on the Boards of Directors for both the MTA and the LIRR.

The MTA is comprised of "subsidiary units" and "component units." The LIRR is of the MTA's "subsidiary units." Aside from the LIRR the wholly owned "subsidiary unit" of the MTA that provides transportation services is the Metro-North Commuter Railroad Company ("Metro-North"). Metro-North provides passenger transportation between New York City and the New York State communities of Westchester, Dutchess, Putnam, Orange and Rockland counties and between New York City and Connecticut communities in New Haven and Fairfield. Together, the LIRR and Metro-North are referred to as MTA's "commuter rails."

The MTA Excess Loss Trust Fund which provides coverage against losses from catastrophic events and provides budget stability to MTA participants is also a subsidiary unit of the MTA, along with MTA headquarters which provides support in budget, legal, real estate and other areas to the MTA component units.

The MTA "component units" that provide transportation services are:

. the New York City Transit Authority and its blended component unit, Manhattan and Bronx Surface Transit Operating Authority which provide subway and bus service in four New York City boroughs;

. the Staten Island Rapid Transit Operating Authority which provides passenger service within Staten Island, and
. the Metropolitan Suburban Bus Authority which provides bus service in New York City and Nassau County.

Also included as component parts of the MTA are the Triborough Bridge and Tunnel Authority which operates toll bridges and tunnels as well as a parking garage and the New York Coliseum.

The MTA commuter rails are the segments of the MTA that are involved in interstate operations. Workers employed by these commuter rails are covered under FELA, while those employed by MTA's intrastate component units (such as New York City Transit workers) are covered by workers' compensation. Prior to creation of the MTA police force, approximately 11,000 of the 64,000 individuals employed by the MTA and its subsidiary and component units were employed by the commuter rails.

MTA apparently attaches significance to denominating its commuter rails as subsidiary units, rather than component units. It refers to the component units as "operationally and legally independent" of MTA headquarters while making no such similar distinction with respect to the commuter rails.

C. *MTA's Functions*

When describing its functions, the MTA states that it "coordinates the planning and overall policies of its agencies, approves operating and capital budgets and performance plans, and monitors financial and operating activities of its agencies." The MTA also states that it "is responsible for certain cross agency support functions." The MTA characterizes its subsidiary agencies, including its commuter

rails as "serv[ing] the public by operating the transportation facilities." Letter dated December 17, 1997 from MTA to General Counsel, U.S. Railroad Retirement Board, Weiss Decl., Exhibit D.

While the MTA's component units are certainly responsible for providing transportation services, the MTA itself is intimately involved in the management, not only of its subsidiaries' finances, but of their real estate and other assets. Thus, the MTA states that the "careful management" of its real estate assets has included a leaseback transaction for the LIRR Hillside maintenance facility, where LIRR trains are repaired and maintained, which transaction produced approximately $22 million in capital funds for the MTA. Funds so obtained, along with other MTA funds are used, *inter alia,* for repairing and upgrading railroad infrastructure, building new facilities and buying new equipment.

The MTA has significant involvement in the marketing of the transportation services available through its subsidiary and component units. The MTA website refers to all transportation facilities (including the LIRR) as part of the "network" of MTA services. Riders are referred to as "MTA customers." Among other things, the MTA takes credit for "offer[ing] the region efficient, environmentally sound travel alternatives."

III. *The MTA Operates a Common Carrier*

The court has considered the facts set forth in the parties' submissions as well as arguments made during a recent oral argument held in this case. It is worth noting that no case has been presented to the court that is directly on point, and it appears that none exists. The many decisions relied upon by the parties, as detailed above, focus on the issue of whether the defendant is engaged in the business of offering

transportation services to the public at large. Where the offer to transport is made to all, common carrier status exists.

Here, there is no question but that the facilities of the MTA and the LIRR are offered to the public at large, and therefore constitute common carriers. The issue in this case, however, is not whether the facilities have common carrier status, but whether those facilities are "operated" by the MTA in a manner sufficient to confer common carrier status within the meaning of the FELA. This precise issue has not heretofore been decided and existing precedent is, accordingly, not helpful.

Seeking to escape the conclusion that it operates the LIRR, the MTA relies upon its own statement that it is the component and subsidiary units that actually "operate" the transportation facilities while the MTA does not. While the MTA concedes certain management responsibilities, it denies any responsibilities that can be described as "operating" its facilities. Such "operation" duties are, according to the MTA, in the exclusive province of its subsidiary and component units.

The plain meaning of the word "operate," however, cannot be parsed as MTA suggests. Put simply, to operate, is noting more than to "perform a function." Black's Law Dictionary 984 (5th ed.1979); *see also* The Random House College Dictionary of the English Language 931 (rev'd ed.1982). While it is certainly true that the LIRR operates a common carrier, it is also true that MTA's extensive involvement in this entity leads to the conclusion that it, too, operates this common carrier.

There is nothing in either FELA or any court case construing the statute that limits the definition of the term "operate" to anything less that its usual broad meaning, *i.e.*, to "function." While the MTA characterizes its input as no

more than policy-making and financial management, the papers before the court, including those demonstrating MTA's extensive involvement in the long range planning, marketing, and the day to day management of its commuter rails, convinces this court that MTA operates a common carrier within the meaning of FELA. As stated by the MTA itself, "[w]ithout the MTA, the two-state, 14 county, 4,000 square-mile territory it serves would grind to a halt." Weiss Decl. Exhibit B at 52.

In view of the foregoing, the court holds that MTA employees such as Plaintiff, assigned to work on the LIRR, are employed by an entity operating a common carrier engaged in interstate commerce. Plaintiff is no less employed by a common carrier today than when he performed the same duties when employed by the LIRR. Accordingly, Plaintiff may proceed pursuant to FELA.

The court is cognizant of state court opinions, relied upon by defendants, stating that the functions of the MTA "do not include the operation, maintenance and control of any facility." *Noonan v. Long Island Railroad,* 158 A.D.2d 392, 393, 551 N.Y.S.2d 232, 233 (1st Dep't 1990), quoting, *Cusick v. Lutheran Medical Center,* 105 A.D.2d 681, 681, 481 N.Y.S.2d 122, 123 (2d Dep't 1984). Those opinions, however, arose in the context of negligence lawsuits where it was held that the proper responsible party was the local transportation provider and not the MTA. These cases did not decide the question of whether the MTA is a common carrier under the FELA definition and are therefore neither binding nor persuasive.

The court cautions that its holding here is limited to those employees of MTA who are engaged in the interstate common carrier operations of its commuter rails. Specifically, the holding that MTA operates a common carrier does not lead to the conclusion that all MTA

employees, including those employed strictly in the MTA's intrastate operations (such as employees of the New York City Transit Authority), are to be covered by FELA.

Thus, employees of the MTA's component parts, including those entities that provide local transportation services and those that operate parking garages, bridges and tunnels are not, by this decision, covered by FELA. The mere interconnectedness of these entities through the MTA does not transform those entities into common carriers engaged in interstate commerce. *Accord Felton v. Southeastern Pennsylvania Transportation Auth.*, 952 F.2d 59, 62, 66 (3d Cir.1991) (refusing to apply FELA to employees engaged in purely intrastate operations, even though the entity for which the employee works is related to a transportation authority (like the MTA) that also oversees the operation of an interstate railway--any decision to the contrary would be an "unwarranted judicial expansion of FELA").

The court's unwillingness to judicially expand or contract the reach of FELA stems from the conviction that such action lies within the exclusive province of the legislature. While the court is of the opinion that the liability standard imposed by FELA in 1908 is an anachronism that has long outlived its usefulness, it is bound to apply the statute as enacted. Unless and until Congress acts to amend FELA to narrow its reach, the court must apply the statute as written by Congress and interpreted by the Supreme Court. Neither the plain language of the statute nor any interpretation thereof supports the narrow interpretation urged by the MTA. Under these circumstances, the court is constrained to hold that MTA operates a common carrier and accordingly interprets FELA to include MTA employees who, like plaintiff, are involved in the interstate operations of the MTA.

In view of the court's ruling that plaintiff, as an employee of the MTA, is covered by FELA, it is unnecessary to rule on the issue, argued in the alternative, that Plaintiff was a borrowed servant of the LIRR.

*CONCLUSION*

For the foregoing reasons, defendants' motion for summary judgment is denied.

SO ORDERED

**[ORDER DENYING REHEARING AND REHEARING *EN BANC*]**
**[UNREPORTED]**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of November two thousand two.

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SEAN GREENE,

Plaintiff-Appellee,

V. Docket No. 00-9292

METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant-Appellant.

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A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Metropolitan Transportation Authority.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

## STATUTORY PROVISIONS INVOLVED

**45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

**45 U.S.C. § 57. Who included in term "common carrier"**

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

## COMMUTER RAIL TRANSIT AGENCIES

| PRIMARY CITY OR REGION SERVED | STATE OR LOCAL GOVERNMENT TRANSIT AGENCY OWNING OR MANAGING RAIL TRANSPORTATION PROVIDER | PROVIDER OF RAILROAD SERVICE (RELATIONSHIP TO TRANSIT AGENCY) |
|---|---|---|
| Baltimore, MD | Mass Transit Administration, Maryland Department of Transportation (MARC) | Amtrak (contract), CSX (contract) |
| Boston, MA | Massachusetts Bay Transportation Authority | Amtrak (contract) |
| Chicago, IL | Regional Transportation Authority | Metra commuter railroad (subsidiary) |
| Chicago, IL | Metra | BNSF (contract), Union Pacific (contract) |
| Chicago, IL/ South Bend, IN | Northern Indiana Commuter Transportation District (NICTD) | NICTD (same entity) |
| Dallas, TX/ Ft. Worth, TX | Ft. Worth Transportation Authority and Dallas Area Regional Transit | Trinity Railway Express (joint subsidiary) |
| Dallas, TX/ Ft. Worth, TX | Trinity Railway Express | Herzog Transit Services, Inc. (contract) |

| | | |
|---|---|---|
| Los Angeles, CA | Southern California Regional Rail Authority (Metrolink) | Amtrak (contract) |
| Miami, FL | Tri-County Commuter Rail Authority | Herzog Transit Services, Inc. (contract) |
| New Haven, CT | Connecticut Department of Transportation (Shoreline East) | Amtrak (contract) |
| New York, NY | Metropolitan Transportation Authority | Long Island Rail Road (subsidiary) |
| New York, NY | Metropolitan Transportation Authority | Metro-North Railroad (subsidiary) |
| Newark, NJ/ New York, NY/ Philadelphia, PA | New Jersey Transit | New Jersey Transit Rail Operations, Inc. (subsidiary) |
| Philadelphia, PA/Harrisburg, PA | Pennsylvania Department of Transportation | Amtrak (contract) |
| Philadelphia, PA | Southeastern Pennsylvania Transp. Authority (SEPTA) | SEPTA Regional Rail Division (subsidiary) |
| San Diego, CA | North County Transit District | Amtrak (contract) |
| San Francisco, CA | Peninsula Corridor Joint Powers Board | Amtrak (contract) |

| | | |
|---|---|---|
| Seattle, WA | Central Puget Sound Regional Transit Authority | BNSF (contract) |
| Washington, DC | Northern Virginia Transportation Commission (NVTC) and Potomac and Rappahannock Transportation Commission (PRTC) | Virginia Railway Express (created by partnership of NVTC and PRTC) |
| Washington, DC | Virginia Railway Express | Amtrak (contract) |

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 02-1173

IN THE

# Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

*Petitioner,*

*v.*

SEAN GREENE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## REASONS FOR DENYING THE WRIT

The Metropolitan Transportation Authorities (hereinafter referred to as "MTA") Petition for Writ of Certiorari is replete with hyperbole and misstatements of law and fact in an attempt to create the impression that a conflict exists among the circuits. "MTA" claims that the Second Circuit Court of Appeals has "misused" the current law and now "stands alone" with its "expansive view of FELA" which opens the proverbial "courthouse door" to a flood of new Federal Employers' Liability Act (hereinafter referred to as "FELA") cases.

None of this is true. There is no conflict among the Circuits. The law applied by the Second Circuit is not "misused", but rather long standing and time tested. The Court is not expanding FELA, it has restored "FELA" to workers who had been covered by the statute for nearly 100 years. Additionally, in spite of overwhelming evidence to the contrary, MTA also seeks to cloak itself with sovereign immunity which this Court and the Third Circuit has previously denied to New York City's two other commuter railroads, Port Authority Trans Hudson, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994) and New Jersey Transit, *Fitchik v. New Jersey Transit Rail Operation*, 873 F.2d 655 (3d Cir. 1989) (en banc).

There are only two questions presented:

Whether the MTA is a common carrier operating a railroad in interstate commerce;

And, whether the MTA is the alter-ego of the State of New York entitled to Eleventh Amendment Sovereign Immunity.

The Second Circuit Court of Appeals unanimously and correctly decided both issues against the petitioner. Both issues are so strongly supported by evidence in the record that review by this Court is unwarranted.

## I.

## THE SECOND CIRCUIT COURT OF APPEALS DID NOT "MISUSE" OR APPLY THE WRONG LAW IN DETERMINING THAT THE MTA OPERATES A RAILROAD WITHIN THE COVERAGE OF FELA

Contrary to the MTA's assertions in its Petition, the Second Circuit does not "stand alone" in its application of the law in determining if an entity is a common carrier operating a railroad in the meaning of FELA. This Court has addressed the issue and defined a common carrier by a number of four times in the last century. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911); *United States Union Stock Yard and Transit Co.*, 226 U.S. 286, 33 S. Ct. 83 57 L. Ed. 226 (1912); *United States v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 39 S. Ct. 283, 63 L. Ed. 613 (1919); *United States v. State of California*, 297 U.S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936).

In 1967, the Fifth Circuit Court of Appeals in *Lone Star Steel Co. v. McGee*, 380 F.2d 640, *cert denied*, 389 U.S. 977, 88 S. Ct. 480, 19 L. Ed. 471 (1967) synthesized these cases and developed a four prong test to determine whether an entity is a common carrier operating a railroad within the meaning of FELA. That test has been universally accepted and uniformly applied. The Second Circuit below correctly analyzed the MTA using the Lone Star criteria and

unanimously agreed with the District Court that the MTA clearly is a common carrier operating a railroad in interstate commerce.

MTA grossly misstates the facts when it declares that the Second Circuit "for the first time in a century of FELA Juris Prudence held that a parent may be liable under FELA because it exerts *some* control over a separately incorporated, operating railroad". (Emphasis Added) (Pet. at 19) Nothing can be further from the truth. The record clearly demonstrates and the Court correctly found that MTA was integrally involved in the essential business aspects of the Long Island Railroad's operation.

The uncontested evidence is that the MTA provides the Long Island Railroad's with the following services:

Advertising;

Marketing;

Budgeting;

Cash management;

Legal services;

Real estate management;

Equipment purchases;

Raises fares and funds;

Issues and services debt;

Negotiates Collective Bargaining Agreements with the Long Island Railroad's unions;

Appoints the Long Island Railroad's President;

Serves as the Long Island Railroad's Board of Directors;

Finances all capital improvements to the Long Island Railroad infrastructure, including stations, trackage and repair facilities;

And, finally provides all of the Long Island Railroad's security personnel through the MTA Police of which plaintiff is a member.

The Long Island Railroad does not exist without "MTA". The District Court, in its Opinion, quoted the MTA: "without the MTA, the two state, 14 county, 4,000 square mile territory it serves would grind to a halt".

The record has such an abundance of evidence that the MTA, the self-proclaimed "largest provider of public transportation in the western hemisphere" is not merely a parent holding company but rather "directly and integrally involved in the essential business aspects of the Long Island Railroad" and therefore a common carrier operating a railroad within the meaning of the FELA.

Indeed, after publicly announcing in November, 2002 a merger of the Long Island Railroad and Metro-North Commuter Railroad to form the new "MTA Railroad", it is utterly ludicrous to argue that the MTA is not a railroad, yet in its petition MTA declares "no one questions that the MTA is not a railroad". (Pet. at 15)

None of the cases cited by the MTA support their contention that there is a conflict among the Circuits. *Iverson v. Southern Minn. Beet Sugar Co-Op*, 62 F.3d 259 (8th Cir. 1995) and *Sullivan v. Scoular Grain Company of Utah*, 930 F.2d 798 (10th Cir. 1991) used the same *Lone Star* test as the Second Circuit here. *Felton v. Southeastern – P.A. Transp. Auth.*, 952 F.2d 59 (3d Cir. 1992) involved an attempt to expand FELA coverage to inter city transit workers who had never been covered by FELA as opposed to the case at bar. Where the plaintiff seeks to thwart the MTA's attempt to remove FELA rights from a group of workers previously covered for nearly 100 years.

MTA's "pierce the corporate veil" argument is irrelevant and not addressed by either the District Court or the Second Circuit Court of Appeals. Nor do any of the decisions of other Federal Agency's, like Railroad Retirement Board, carry weight sufficient to change the outcome or cause this Court to grant cert. The fact that FELA claims can arise out of "local auto accidents" is not federalizing "a run-of-the-mill auto accident tort claim". It has never been the nature of the cause of action but rather the work in furtherance of interstate commerce by rail that governs FELA. Equally irrelevant is the fact that MTA gave what it calls "Workers' Compensation" to Sean Greene. Regardless of the name, Police Officer Greene was entitled to the same full medical and full pay while out injured under his Collective Bargaining Agreement with the Long Island Railroad.

Finally, the MTA's attempt to grab the Court's attention with the sky is falling argument that "the Second Circuit's Decision flashed a green light inviting FELA suits against regional transportation agencies nation wide" together with its campaign to solicit Amicus Briefs from its fellow

commuter railroads around the country is pointless. Neither the FELA nor the common law definition of a common carrier set forth by this Court and synthesized by the Sixth Circuit in Lone Star has changed. As the District Court noted Police Officer Sean Greene was no less employed by a common carrier today with the MTA than he was when he performed the same duties when employed by the Long Island Railroad. Regional commuter railroads are capable of organizing themselves in such a way as to isolate workers covered by FELA from those employees engaged in purely intra-state transit operations.

## II.

## THE SECOND CIRCUIT COURT OF APPEALS CORRECTLY FOUND "MTA" DOES NOT QUALIFY FOR ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Although jurisdiction can be raised at any time during the pendency of a case, MTA's motion was raised as an after thought following the Second Circuit's Decision denying its appeal of the common carrier issue and for a very good reason it did not merit a written opinion by the Court. MTA is so clearly and completely autonomous from the State of New York that it doesn't remotely qualify for sovereign immunity.

MTA argues, in essence, that the following cases *Federal Maritime Commission v. South Carolina State Port Authority*, 535 U.S. __, 122 S. Ct. 1864 (2002); *Alabama State Docks Terminal Ry. v. Lyles*, 797 So. 2d 432 (2001); *Abdulwali v. Washington Metro Area Transit*, 315 F.3d 302 (D.C. Cir. 2003); and, *Morris v. Washington Metro-Area Transit*, 315 F.3d 302 (D.C. Cir. 2003) signal a change in the century's

old analysis of a sovereign under the Eleventh Amendment. But in all of these cases, the issue of whether the entity was the alter-ego of the State entitled to sovereign immunity was conceded. None of them challenged or even criticized the standards set forth by this Court's Decisions in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994); and, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (1988), *aff'd on other grounds*, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990).

Using these standards the MTA's constitutional status as an instrumentality of the State of New York, is even less tenable than that of New York City's two other interstate commuter railroads, New Jersey Transit and Port Authority Trans Hudson who both failed to qualify for sovereign immunity a decade ago in *Fitchik v. New Jersey Transit Rail Operation*, 873 F.2d 655 (3d Cir. 1989) (en banc) and Hess, supra. In Briefs presented to the Second Circuit on Motion, MTA concedes that it is a fiscally autonomous state instrumentality receiving only 3.71% of its income from State of New York subsidies. The direct taxes MTA cites are from the regions it services not from the State Treasury. The impact of any potential judgment against MTA will have no effect whatsoever on the Treasury of the State of New York. The State of New York is by statute not responsible for the debt and obligation of the MTA. Section 1269 Public Authorities law.

MTA has created a number of arms to protect itself and allow it to be fiscally autonomous:

1) It has its own captive insurance company, First Mutual Transportation Assurance Company for property and primary liability insurance;

2) "ELF", an excess loss trust fund to provide coverage for catastrophic losses;

3) MTA's special assistance fund to cover operating losses to any of its subsidiary transportation operations.

4) MTA has the power to issue debt through revenue bonds, excess loss trust fund bonds, NYCTA Transit Facility Revenue bonds, TBTA general purpose revenue bonds, TBTA Mortgage recording tax bonds and beneficial interest certificates;

5) MTA has complete control over its budget, case management and investments. It has the power to raise rates and increase operating funds;

6) MTA reports that it generates two-thirds of its 1.9 billion capital budget and is targeting being totally self-sufficient in the near future.

The MTA is governed by a 17 member Board of Directors of which only 5 are selected by the Governor of the State of New York. The other 12 are selected by other entities, including 3 from the Mayor of New York City and one from each of the following counties served by MTA: Dutchess,

Westchester, Rockland, Nassau and Orange; one from Transport Worker's Union; one from the permanent citizens committee; one from Long Island Commuter Committee; one from Metro-North Commuter Committee. Because of its diversity it is clearly not a board dominated by State Government.

Finally, the State does not have veto power over the lawful exercise of MTA's powers. Section 1263 N.Y. Public Authorities Law.

After considering the relevant facts and the applicable law, the Second Circuit denied MTA's Motion to Dismiss for lack of Jurisdiction under the Eleventh Amendment and for the reasons set forth should not be disturbed by this Court.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
*Petitioners,*

v.

SEAN GREENE,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED FOR REVIEW

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, provides a comprehensive remedial scheme for employees of common carriers by railroad injured in the course of their employment due to the negligence of their employers. This case presented two significant questions for review:

First, whether the Eleventh Amendment to the United States Constitution protects public transit agencies created by state law from liability under FELA for injuries suffered by their employees.

Second, whether FELA extends to public transit agencies who do not operate interstate railroads themselves, but that have subsidiaries or contractors that are "common carrier[s] by railroad."

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## BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Public Transportation Association ("APTA"), as *amicus curiae,* supports the Petition of Metropolitan Transportation Authority ("MTA") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.[1] Counsel for both parties have given their consent for APTA to file this brief, and verification of that consent has been filed with the Court.

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6. Petitioner Metropolitan Transportation Authority, however, is a dues-paying member of APTA.

## INTEREST OF *AMICUS CURIAE* AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

APTA is a non-profit trade association of more than 1,500 public and private member organizations responsible for planning, designing, constructing, financing and operating public transportation systems. APTA's members include state associations, academic institutions, state departments of transportation, public transit agencies, metropolitan planning organizations and businesses that supply products and services to the public transportation industry.

The decision below threatens to upset the established expectations of the 17 public transit agency members of APTA that provide commuter rail service as part of the public transportation system with respect to the coverage of their employees under FELA.

First, many public transit agencies are creatures of the State and therefore enjoy sovereign immunity from suit under federal causes of action. The decision below would subject such agencies to suit under FELA contrary to sovereign immunity principles under the Eleventh Amendment of the U.S. Constitution as reaffirmed by this Court in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) and *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987).

Second, the commuter rail operations of many public transit agencies nationwide (like the MTA) are performed by a separate division or subsidiary of the agency, or an independent contractor. These public transit agencies provide certain management services and establish policies for the commuter rail operations, but many of them do not themselves directly operate the trains.

Third, the decision below conflicts with findings and decisions of the Railroad Retirement Board, the Interstate Commerce Commission (now the Surface Transportation Board) and the National Mediation Board that have not found public transit agencies to be covered by the rail statutes they administer. These other rail statutes apply the same "carrier" test as FELA.

## STATEMENT OF THE CASE

This case arises from a car accident in which Plaintiff-Respondent Sean Greene claims he was injured during the course of his employment duties. At the time of his injury, Greene was a police officer employed by MTA, a public benefit corporation created pursuant to the laws of the State of New York. Greene filed this case in the United States District Court for the Eastern District of New York, seeking damages for his work related injury from MTA under FELA. *See Greene v. Long Island R.R. Co.*, 99 F. Supp. 2d 268 (E.D.N.Y. 2000), Petitioner's Appendix[2] at 32a-45a, *aff'd* 280 F.3d 224 (2d Cir.), Pet. App. at 1a-28a, *reh'g denied en banc*, No. 009292 (2d Cir. Nov. 13, 2002), Pet. App. at 46a-47a.

MTA was created by the Legislature of the State of New York in 1965 under the State's Public Authorities Law, N.Y. Pub. Auth. L. § 1263(1)(a) (McKinney 1999). MTA's statutory responsibilities include "the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, *including but not limited to such transportation by railroad*, omnibus, marine and air." *Id.* § 1264(1) (emphasis added).

The Legislature of the State of New York granted MTA the power to "acquire . . . any transportation facility," *id.*, and to "operate, maintain, renovate, improve, . . . or repair" such a facility and "lease railroad cars for use in its passenger service." *Id.* § 1266(2) & (7). MTA is authorized to levy and collect fares and to establish schedules, standards

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[2] Hereinafter citations to Petitioner's Appendix will be abbreviated "Pet. App."

of operation and public safety rules and regulations as necessary for the "use and operation of any transportation facility." *Id.* § 1266(3). MTA is also authorized to provide and maintain a police department for all MTA affiliates. *See id.* § 1266-h(1). MTA may exercise these powers itself or it may "cause one or more of its powers . . . to be exercised or performed by . . . one or more wholly owned subsidiary corporations." *Id.* § 1266(5).

MTA owns two subsidiaries that operate commuter railroads: the Long Island Railroad ("LIRR") and Metro-North Commuter Railroad Company ("Metro-North"). MTA does not operate any railroad system or services itself.

MTA filed a motion for summary judgment in the District Court, arguing that it is not a proper defendant under FELA because it is not a common carrier by railroad. *See Greene*, 99 F. Supp. 2d at 270, Pet. App. at 32a. The District Court denied that motion. *See id.* at 275, Pet. App. at 45a. The District Court found that by virtue of MTA's "extensive involvement" in LIRR's activities, MTA "operates" the LIRR's railroad. *Id.* at 274, Pet. App. at 43a. The District Court held that "it is not the corporate form of the entity" that determines an entity's status under FELA, but rather the "functions" it performs. *Id.* at 272, Pet. App. at 37a. The District Court held that FELA requires "nothing more" on the part of a parent "than to 'perform a function'" in connection with the subsidiary's railroad activities. *Id.* at 274, Pet. App. at 42a.

At MTA's request, the District Court certified the question of whether MTA is a common carrier under FELA to the United States Court of Appeals for the Second Circuit. *See Greene*, 280 F.3d at 229, Pet. App. at 7a. The Court of Appeals granted MTA's motion for leave to appeal pursuant to 28 U.S.C. § 1292(b), but ultimately affirmed the District Court. *See id.* at 229, 240, Pet. App. at 7a, 28a. The Court of Appeals found that FELA liability extends to any entity

that is substantially involved in the "management and operation of the business" of a railroad, and is therefore not limited to the owner or operator of the railroad. *See id.* at 230, Pet. App. at 8a. MTA timely filed a Petition for Rehearing with the Court of Appeals. *See* Pet. App. at 46a-47a.

Thereafter and following this Court's recent decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), MTA filed a motion with the Court of Appeals to remand the case to the District Court with instructions to dismiss Respondent's claims against MTA on the grounds that the Eleventh Amendment to the United States Constitution protects MTA from FELA suits by its employees. *See* Pet. App. at 29a-31a.

On November 13, 2002, the Court of Appeals denied MTA's petition for rehearing. *See id.* at 46a-47a. On January 21, 2003, the Court of Appeals denied MTA's motion to vacate, remand and dismiss on Eleventh Amendment grounds. *See id.* at 29a-31a. MTA's timely Petition for a Writ of Certiorari from this Court followed.

## REASONS FOR GRANTING THE WRIT

1. The Court should grant a writ of certiorari to review the question whether a public transit agency created by state law is entitled to assert Eleventh Amendment immunity from suit in an action brought by an employee under FELA. As Petitioner correctly points out, the decision below threatens the sanctity and stability of the treasuries of the States and is therefore at odds with this Court's recent jurisprudence confirming the immunity of the States from suit absent their consent. We will not repeat Petitioner's arguments here.

The decision of the court below effectively requires the obligation of state moneys to pay twice for the same injury to one of its citizens.[3] The courts of the United States simply lack that power, unless it is conferred specifically by an amendment to the U.S. Constitution adopted subsequent to the Eleventh Amendment. That is not the case here. FELA, the statute under which Respondent will receive his second recovery if this decision is allowed to stand, was enacted pursuant to Congress' powers under the Commerce Clause. *See Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1 (1912) (upholding constitutionality of FELA under commerce clause powers).

As this Court has consistently held in recent years, Congress lacks the authority under its commerce power to abrogate the states' immunity from suit, even when the statute purporting to subject the state to suit involves interstate or international transportation. *See, e.g., Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S.

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[3] In the case below, Respondent received workers compensation payments prior to asserting his FELA claim. *See* Petitioner's Brief at 2-3.

743 (2002); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468 (1987). The Court's recent jurisprudence confirms that neither MTA, nor any other public transit agency, waives that immunity by operating a railroad. *See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-85 (1999) (holding that state does not waive immunity from suit by participating in interstate commerce). It is illogical to suggest that a public transit agency can do so by being a parent of an entity that operates a railroad. To hold a parent liable when its subsidiary operates a railroad, when the parent would be immune if it operated the railroad itself is nonsensical and creates a conflict with the Court's holding in *Welch* in which the Court held that the Texas Department of Highways and Public Transportation was immune from suits by its employees under the Jones Act.[4]

Article III of the Constitution of the United States gives the judiciary no more power to encroach upon the sovereignty of the States than it has in an action against the

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[4] Section 33 of The Merchant Marine Act of 1920, commonly known as the "Jones Act," 46 U.S.C. app. § 688, incorporates FELA by reference and makes FELA remedies available to seaman. *See Welch*, 483 U.S. at 471. As the Court recognized in overruling *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the immunity issues in the Jones Act and FELA are symmetrical. *See Welch*, 483 U.S. at 471.

United States.[5] This principle, confirmed by the people of the United States in the Eleventh Amendment to the U.S. Constitution, has properly guided this Court's recent jurisprudence under that Amendment. This case involves the application of that principle.

This principle is one of the most fundamental in the constitutional structure of the United States. The Constitution of the United States through the Appropriations and Property Clauses, U.S. Const. art. I, § 9, cl. 7; *id.* art. IV, § 3, cl. 2, reserves the power to collect and spend public moneys exclusively to the elected representatives of the people. Analogous provisions in the constitutions of the majority of the several states, at least one of which predates the Constitution of the United States, do the same.[6] Therefore, unless the strict test articulated by the Court in *Seminole* is met, *see Seminole Tribe of Fla.*, 517 U.S. at 55, neither the judiciary nor the executive has the power to

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[5] Just as the States are immune from private suits, the Court subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821). Of course, the United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (recognizing that the States adopted the Constitution which "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers). In *Hans v. Louisiana*, 134 U.S. 1, 17 (1890), the Court explained the principle of sovereign immunity as one and the same for both the States and the United States.

[6] *See* S.C. Const. art. XVI (1778), *available at* <http://www.yale.edu/lawweb/avalon/states/sc02.htm> (last visited Apr. 7, 2003). The current constitution of the State of New York contains an appropriations clause similar to that found in the U.S. Constitution. *See* N.Y. Const. art. VII § 7.

abrogate a State's immunity from suit and order that money from a state's public fisc be paid to a private individual. That strict test is not met when a state public transit agency or one of its subsidiaries or contractors operates a railroad.

Had Respondent's FELA action been brought against a federal agency, there is no doubt that the federal government would be immune from the suit absent a specific waiver of sovereign immunity.[7] This is particularly significant given the federal Department of Transportation's substantial ownership in and oversight of Amtrak. *See* 49 U.S.C. §§ 24302, 24304(d)(1). Simply because Amtrak itself may be exposed to FELA liability for work related injuries of its employees, it does not follow that the DOT is also exposed or that the federal government has waived its immunity from suit through its oversight of Amtrak. Nor have the States or their public transit agencies waived their immunity from suit under FELA by operating commuter railroads or by having subsidiaries that do. *See College Savs. Bank*, 527 U.S. at 681-85; *Welch*, 483 U.S. at 476-78.

2. The Court should also grant the petition to clarify whether the performance of certain management functions by a public transit agency for a subsidiary that is a "common

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[7] For example, the statutory history and the application of the Jones Act to the United States establishes that the United States did not waive its sovereign immunity by enacting FELA. This Court's jurisprudence has recognized that absent the waivers of sovereign immunity in the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-752, and the Public Vessels Act, *id.* §§ 781-790, the United States would be immune from suit under the Jones Act. *See, e.g., Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946), *overruled in part on other grounds Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949) (recognizing that Congress waived sovereign immunity of United States for Jones Act claims through Suits in Admiralty Act).

carrier by railroad" makes the public transit authority itself a "common carrier by railroad."

To be an employer covered by FELA, an entity must be (1) a common carrier; (2) a railroad; and (3) engaged in interstate or foreign commerce. *See* 45 U.S.C. § 51. The issue presented here is when, if ever, a parent organization that does not actually run the trains becomes a "railroad" subject to FELA liability.

The Court has twice before addressed the "railroad" element. In *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), the plaintiff's employer was a common carrier engaged in interstate commerce. The plaintiff worked in a railway express car that was part of a train operated by a railroad company. He brought suit under FELA against his employer, Wells Fargo, for injuries he suffered in a derailment.

The Court held that the employer was not an FELA employer because a railroad is:

> one who operates a railroad as a means of carrying for the public — that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad; by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employés; by the use of similar words in closely related acts which apply only to carriers operating railroads; and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown.

*Id.* at 187-88 (internal citations omitted).

The question of the kind of employer covered by FELA next came before the Court in *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968). In *Edwards*, the plaintiff's employer owned, maintained and leased refrigerator cars used to transport perishable goods in interstate commerce. The company repaired its own cars, and owned buildings and switching tracks for that purpose. *See id.* at 539. It serviced the cars while they were operating in interstate commerce and controlled their eventual destination, but the cars themselves were moved in trains operated by railroad companies. *See id.*

Although the Court agreed that "it is undoubtedly true that [the company] performs some railroad functions," it held that it was not a railroad within the meaning of FELA. The Court noted "that there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." *Id.* at 540. To be liable under FELA, the plaintiff's employer must do more than "perform[] some railroad functions," it must be a "going railroad." *Id.* at 539-40.

The test the Court articulated in these cases restated the statutory wording without giving specific insight into what makes an entity a "railroad," other than to say that it must be a "going railroad" "operated" by the entity the plaintiff was seeking to hold liable under FELA. *See Edwards*, 390 U.S. at 540; *Taylor*, 254 U.S. at 187-88. At least since *Taylor* was handed down in 1920, it has been commonly accepted

that to be a "railroad" an entity actually had to run the trains.[8]

In reliance on these decisions, the States have structured their public transit agencies in such a way as to provide a sharp demarcation between entities that are unquestionably railroads (such as the LIRR) and other transit operations that are not (such as toll bridges or bus services). Some public transit agencies, like MTA, have commuter railroads as subsidiaries; others, such as APTA member Southeastern Pennsylvania Transportation Authority, organize their railroads as separate divisions. *See Felton v. Southeastern Pa. Transp. Auth.*, 952 F.2d 59, 60 (3d Cir. 1992). Still others, such as APTA member Massachusetts Bay Transportation Authority, contract with outside railroads to provide the actual transportation services. *See* Mass. Gen. Laws ch. 161A § 3(f) (West 2000).

Regardless of the exact legal relationship between the public transit agencies and the entities that actually run the trains and other transportation services, the "parent" organization typically provides overall management functions, such as finance, budgeting, marketing, labor relations and real estate, for all of the modes of transportation offered. In the case of MTA (and many other

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[8] *See, e.g., Iverson v. Southern Minn. Beet Sugar Coop.*, 62 F.3d 259 (8th Cir. 1995) (holding that factory owner with in-plant railroad not subject to FELA liability); *Sullivan v. Scoular Grain Co. of Ut.*, 930 F.2d 798 (10th Cir. 1991) (holding that joint venture that owned tracks but did not operate railroad not subject to FELA liability); *Chaneyfield v. City of N.Y.*, 525 F.2d 1333, 1337-38 (2d Cir. 1976) (holding that operating much cars in a tunnel project does not subject employer to FELA liability); *cf. Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967) (holding that steel company was subject to FELA liability because it owned and operated railroad equipment and performed rail services itself).

APTA members) the public transit agency also provides security for all of its operations — railroad, buses, bridges and the like.

A primary purpose of centralizing such functions is to provide cost-effective management and overall policy guidance for all mass transportation services on a regional basis. In many cases, the public transit agency assumed ownership over what were previously privately-owned transportation companies that simply could not provide the services at a profit. Public transit agencies are able to provide comprehensive transportation solutions, raise money to rehabilitate old facilities and build new ones with taxpayer-backed bond issues or local tax revenues, and cut costs through centralized and coordinated management. Moreover, in these perilous times, public transit agencies can allocate resources for security of the traveling public where they are most needed.

The court below very broadly held that the MTA is a "common carrier by railroad" because, in its analysis, there is more to the operation of the business of a railroad "than the operation of the transportation facilities themselves." *Greene*, 280 F.3d at 240, Pet. App. at 27a.

If the courts below had found that Respondent was an employee of the LIRR because he was a borrowed servant, or acting for the MTA and the LIRR simultaneously, then we know what the proper test for determining whether he was covered by FELA would be.[9] But the Court of Appeals did not take this position. Rather than consider *the employee's*

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[9] *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 325-26 (1974) (holding that person not employed by a railroad but providing services to the railroad does not satisfy FELA's requirement that he was injured "while employed by" the railroad unless he meets the common law "borrowed servant" test).

*relationship to the LIRR* (i.e., whether he was a borrowed servant of the LIRR), the court below focused instead on *the employer's relationship to the LIRR*. That cannot and should not be a proper consideration.

3. If MTA and entities like it are held to be "going railroads," then FELA will displace workers compensation or similar laws applicable to state employees for far more than just police or security forces guarding parking lots, depots and bridges.[10] The Court initially interpreted FELA to require a plaintiff employee to show that "at the moment of injury" he or she was engaged in an activity that constituted interstate commerce. *See, e.g., Shanks v. Delaware, Lackawanna & W. R.R. Co.*, 239 U.S. 556, 557-58 (1916). Congress amended the statute in 1939 to broaden the category of covered employees to include not just persons who were actually engaged in interstate or foreign commerce at the time of their injury, but also persons any part of whose duties were in the furtherance of, or "directly or closely and substantially" affected such commerce. Act of August 11, 1939, 53 Stat. 1404 (1939). The amendment was "designed to obliterate fine distinctions" based upon what tasks the employee was performing at the time of injury. *Reed v. Pennsylvania R.R. Co.*, 351 U.S. 502, 505 (1956); *see also* Senate Committee on the Judiciary, Amending the Employers' Liability Act, S. Rep. No. 661, 76th Cong., 1st Sess. 2-3 (1939).

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[10] For example, the Georgia Court of Appeals recently confirmed that employees of APTA member Metropolitan Atlanta Rapid Transit Authority are covered by the Georgia Workers Compensation Act rather than the Georgia Employers' Liability Act (which is modeled on FELA). *See Williams v. Metropolitan Atlanta Rapid Transit Auth.*, 542 S.E.2d 199 (Ga. Ct. App. 2000).

As a result of the 1939 amendment, FELA was extended to cover clerical personnel and others who are not exposed to the special hazards of the railroad industry. *See Reed*, 351 U.S. at 505-06. Indeed, anyone who worked for a "common carrier by railroad" engaged in interstate or foreign commerce became entitled to assert the remedies provided by FELA because the "benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands." *Id.* at 506.

APTA's member public transit agencies have been organized in large part on the basis that employees who did not work directly for the entity providing rail services were not covered by FELA. Thus, injured employees who worked for public transit agencies (as opposed to the subsidiaries or divisions directly operating the trains) were covered under workers compensation laws, or the equivalent for state employees. If the decision below is allowed to stand, then employees of public transit agencies could be considered employed by a "going railroad," and thus able to sue in state or federal courts for damages under FELA. Not only would such a result displace settled expectations, it would disrupt legal relations carefully constructed by state laws.

The financial effects of altering the basis of liability from a no-fault system of defined workers compensation benefits to a fault-based tort system may be devastating. FELA's "featherweight" burden of proof — coupled with the availability of tort damages for not only medical expenses and lost wages, but also damages for pain, suffering and mental anguish — will increase the likelihood of large, unpredictable judgments. *See, e.g., Norfolk & W. Ry. Co. v. Ayers*, __ U.S. __, No. 01-963 (Mar. 10, 2003). The public transit agencies' present insurance coverage will have to be extensively revised to shift from much cheaper workers

compensation coverage to liability insurance covering tort claims.[11] For those entities that are self-insured, the exposure to large tort judgments may threaten their financial viability and the ability to provide essential transportation services to the public.[12]

4. The decision below also conflicts with prior administrative decisions holding that public transit agencies are not common carriers by railroad and that their labor relations are not governed by the Railway Labor Act, 45 U.S.C. §§ 151-188, but rather by state law. *See, e.g., State of Cal. v. Taylor*, 353 U.S. 553 (1957). In this respect, the decision below is directly contrary to those of the National Mediation Board, the entity which supervises labor relations in the railroad industry. The National Mediation Board has previously determined that the MTA is not covered by the Railway Labor Act despite its relationship with the LIRR and Metro-North. *See Application of Int'l Bhd. of Teamsters*, 8 N.M.B. 1, 3-4 (1980). The decision below also calls into question whether employees presently covered either by state retirement systems or by Social Security should instead be covered under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v. However, the Railroad Retirement Board, which is the Federal agency that administers the Railroad Retirement Act, has determined that APTA member Massachusetts Bay Transportation Authority, which contracts with an independent contractor for commuter rail services, is not subject to the Railroad

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[11] *See* 101 Cong. Rec. E3622 (daily ed. Oct. 31, 1989) (remarks of Rep. Whittaker) (explaining that no-fault based state workers' compensation scheme is more cost-effective than the billion dollar a year cost of FELA to railroad industry).

[12] *See* 101 Cong. Rec. S9813 (daily ed. Aug. 2, 1989) (remarks of Sen. Kasten) (highlighting sharp increase in FELA verdicts).

Retirement Act because it does not actually operate the service.[13]

The decision below has the effect of rejecting years of court decisions, federal and state legislation, and administrative regulation. For example, state agencies that have acquired abandoned railroads, or those about to be abandoned,[14] have not even been considered common carriers unless they directly operated the trains. *See, e.g.*, 49 C.F.R. § 1150.22 (2002). And federal regulators have not considered private holding companies performing essentially the same management functions as MTA to be "carriers" under the Interstate Commerce Act. *See, e.g., Guilford Transp. Indus., Inc.*, 366 I.C.C. 294 (1982). Finally, Congress itself, in extending the benefits of FELA to additional railroad employees in 1939, expressly declined to broaden the definition of employers subject to the Act beyond direct operators of "going railroads." *Edwards*, 390 U.S. at 541.

The decision below, if not reviewed, will "dislodge settled rights and expectations [and] require an extensive legislative response." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Court should therefore grant review to consider whether a public transit

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[13] *See* Memorandum of Deputy General Counsel, Railroad Retirement Board, to Director of Research and Employment Accounts (Oct. 31, 1990). A copy of that Memorandum is included as Appendix A hereto.

[14] For example, prior to becoming a subsidiary of MTA, the LIRR was a private railroad that became financially ruined as of 1965. As a result of its precarious financial situation, the State of New York assumed operations, ultimately acting through MTA. *See* Joseph J. Amato, *The MTA, It's Not "Going Your Way" — Liability of the Metropolitan Transportation Authority Under FELA: Greene v. Long Island R.R.*, 75 St. John's L. Rev. 113, 121 n.50 (2001).

authority operates a "going railroad" by performing certain management functions for a railroad subsidiary that do not involve directly operating the trains.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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April 11, 2003

# Appendix A

## APPENDIX A

UNITED STATES GOVERNMENT RAILROAD RETIREMENT BOARD
MEMORANDUM L-90-160
OCT 31 1990

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: Massachusetts Bay Transportation Authority Employer Status

This is in response to your Form G-215 dated August 1, 1990, wherein you asked me to determine the status of the Massachusetts Bay Transportation Authority (hereafter MBTA) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer status of MBTA has not previously been considered. The MBTA is a political and corporate subdivision of the Commonwealth of Massachusetts established in 1964 under section 2, Chapter 161A of the General Laws of that state. The MBTA has the authority to conduct mass transit operations within its area of operations. In a letter dated June 28, 1990, Mr. Ralph L. Duvall, MBTA's Director of Railroad Operations, advised the Board that MBTA has contracted with the National Railroad Passenger Corporation (hereafter Amtrak), an employer covered under the Acts, to operate 479.1 track miles used in commuter service. One of the commuter lines (the Attleboro line) crosses into Rhode Island. MBTA's contract with Amtrak went into effect on January 1, 1987. Amtrak employs 1031 people to provide MBTA commuter service. These employees are compensated and reported by Amtrak through its own payroll. Mr. Duvall further stated that MBTA is not subject to the jurisdiction of the Interstate Commerce Commission and its operations do not use any electric locomotive power. He also provided a copy of the

contract between MBTA and Amtrak which is currently in effect.

As you are aware, the definition of an employer is found un section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231 (a) (1)) and in a substantially similar provision of the Railroad Unemployment Insurance Act. An employer is defined, in pertinent part, to include:

> "(i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49 [the Interstate Commerce Act];
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, on or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, * * *."

In general, (former) Part I of the Insurance Commerce Act applies to common carriers engaged in the transportation of passengers or freight, wholly or in part by railroad, in interstate commerce. A governmental unit can be a common carrier so as to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Legal Opinions L–81–160 and L–90–47.

Subchapter I of Chapter 105 of Title 49, section 4(b), provides as follows:

> "(b) the Interstate Commerce Commission does not have jurisdiction under this subtitle over rail mass transportation provided by a local public body if –

(1) the Commission would have jurisdiction but for this section; and

(2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided." 49 U.S.C. § 10504(b).

Section 6, Chapter 161A of the Annotated Laws of Massachusetts provides that the affairs of MBTA shall be managed by a board of directors appointed by the governor of the state. Thus, in accord with 49 U.S.C. § 10504(b), the MBTA, like other providers of mass rail transportation, is not subject to the Interstate Commerce Act. However, Subsection (c) of that section provides as follows:

> "Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to applicable laws of the United Sates related to: –
>
> (1) safety
>
> (2) the representation of employees for collective bargaining; and
>
> (3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers."

The Railroad Retirement and Railroad Unemployment Insurance Acts are laws of the United States related to "retirement, annuity and unemployment systems". Therefore, the exemption contained in 49 U.S.C. § 10504(b) is not applicable to a determination regarding coverage under the Acts administered by the Board. 49 U.S.C. § 10504(c), cited above, is a clear

statement by Congress that providers of urban mass transit such as the MBTA may, notwithstanding their exemption under subsection (b) from ICC jurisdiction, be subject to laws such as the Railroad Retirement and Railroad Unemployment Insurance Acts.

However, in the past this office has not held a rail carrier to be an employer unless it has actually commenced operating a railroad. See Legal Opinions L–81–160 and L–90–47. The MBTA is not a operator of a railroad and has never done so to this date. It is merely a subsidy disbursing entity of state government which contracts with a rail operator, currently Amtrak, to provide commuter service. Such service has been provided by rail carriers, including the Boston and Maine, under contract since MBTA's inception in 1964. Pursuant to its current contract, Amtrak presently provides all services, including equipment, maintenance, training and employees. Employees providing service under the contract are compensated by Amtrak and reported through its payroll. Under the contract, the MBTA has no control over the operations of the commuter service provided by Amtrak, except the limited right to modify the schedule.

Therefore, it is my opinion that the MBTA is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. A new submission should be made if the MBTA should actually begin operating as a carrier by railroad. An appropriate Form G–215 is attached.

*/s/ Steven A. Bartholow*
Steven A. Bartholow

Attachment

Supreme Court, U.S.
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No. 02-1173

IN THE

# Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
*Petitioner*,

v.

SEAN GREENE,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICUS CURIAE* SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY IN SUPPORT OF PETITIONER

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## BRIEF OF *AMICUS CURIAE* SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the Southern California Regional Rail Authority (hereinafter referred to as "*Amicus*" or "SCRRA") respectfully submits this brief in support of the Petitioner.[1] This brief is submitted with the consent of the attorneys for both the Petitioner and the Respondent. Letters from counsel for both Petitioner and Respondent stating their consent to participation of *Amicus* have been filed with the Clerk.

[1] Pursuant to Rule 37.6, counsel for Amicus states that no other party contributed to the authorship of this brief or made a monetary contribution to its preparation or submission.

## DECISION BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Greene v. Long Island R. Co.*, is reported at 280 F.3d 224 (2nd Cir. 2002).

## INTEREST OF THE *AMICUS CURIAE*

SCRRA is an independent joint powers agency created pursuant to Cal. Pub. Util. Code § 130255 (2003) for the purpose of planning, designing, constructing and administering the operation of regional rail passenger lines serving the counties of Los Angeles, Orange, Riverside, San Bernardino and Ventura in California. The regional commuter rail system is operated on railroad lines that its member agencies either own outright or have secured the right to use from the freight railroads. The five member agencies are: Los Angeles County Metropolitan Transportation Authority (hereinafter, "LACMTA", which has succeeded to the rights and obligations of the former Los Angeles County Transportation Commission), Orange County Transportation Authority (hereinafter, "OCTA"), Riverside County Transportation Commission (hereinafter, "RCTC"), San Bernardino Associated Governments (hereinafter, "SANBAG"), and Ventura County Transportation Commission (hereinafter, "VCTC").

SCRRA commenced operation in October 1992. As of December 2002, it provided service on seven corridors serving 53 stations and 512 route miles under the trade name "Metrolink." It operates 138 trains each weekday, serving an average daily ridership of approximately 34,000 people. *See* http://www.metrolinktrains.com/about/facts_and_timeline.asp.

Each of SCRRA's member agencies, like Petitioner in this proceeding, is a creature of state statute that has authority to

operate and/or subsidize more than one mode of transit.[2] Each will be adversely impacted by the expansion of the reach of the Federal Employers Liability Act, 45 U.S.C. 51, *et seq.* (2003) ("FELA"), beyond interstate rail operations to wholly *intra-state* operations.

While having some similarity to the circumstances of Petitioner, *Amicus* and its member agencies are different in important respects. The five member agencies of SCRRA each own some interest in rail lines that are used for SCRRA's commuter rail operations and are also used in interstate commerce. *See Southern Pacific Trans. Co.—Abandonment Exemption—Los Angeles Co., CA*, 8 I.C.C. 2d 495 (1992), *reconsideration denied*, 9 I.C.C. 2d 385 (1993); *Orange County Transp. Authority—Exemption—Atchinson, T. & S.F. Ry Co.*, 10 I.C.C.2d 78 (1994); *Ventura County Transp. Comm'n—Acquisition Exemption—Southern Pacific Transp.*, Finance Docket No. 32794, *slip op.* 1995 WL 764468 (I.C.C. 1995). As a result of rights and obligations these agencies acquired along with these lines, the Surface Transportation Board ("STB") and its predecessor the Interstate Commerce Commission ("ICC")[3] have concluded that they are rail carriers providing transportation subject to the STB's jurisdiction under Title 49 U.S.C. Subt. IV (2003).

None of these member agencies operates commuter rail service themselves. SCRRA was created specifically for that purpose. Each operates other modes of transit operations, including bus (LACMTA, OCTA and VCTC operate bus

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[2] Specifically, LACMTA was created pursuant to Cal. Pub. Util. Code § 130050.02 (West 2003), OCTA, RCTC and SANBAG were created pursuant to Cal. Pub. Util. Code § 130050 (West 2003), and VCTC was created pursuant to Cal. Pub. Util. Code § 130050.1 (West 2003).

[3] The ICC was abolished by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (December 29, 1995) and the STB was created to fulfill the remaining functions related to regulation of interstate commerce.

lines; RCTC and SANBAG subsidize bus operations) and/or heavy and light rail operations (LACMTA).[4] Each is represented on SCRRA's eleven member Board of Directors, which according to the Joint Powers Agreement exercises all powers of SCRRA. Each sends a representative to a technical advisory committee, an informally established group that advises SCRRA staff in the implementation of the agency's stated mission. None has any direct connection to the provision of freight service that occurs on the lines each owns. Yet each faces increased exposure to the costs associated with awards to injured employees under FELA if the decision of the court below is allowed to stand and the reach of FELA is allowed to extend beyond employees of interstate railroads.

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[4] Three distinct types of rail-related transit services are provided in the Los Angeles area by SCRRA and its member agencies. The American Public Transportation Association's *2003 Public Transportation Fact Book* (2003) describes the three modes of rail service as follows:

(1) "Commuter rail, which is an electric or diesel propelled railway for urban passenger train service consisting of local short distance travel operating between a central city and adjacent suburbs [SCRRA also provides suburb-to-suburb commuter rail service]. . . . Such rail service, using either locomotive hauled or self propelled railroad passenger cars, is generally characterized by multi-trip tickets, specific station to station fares, railroad employment practices and usually one or two stations in the central business district." *Id.* at 170.

(2) "Heavy rail (metro, subway, . . .) is an electric railway with the capacity for a heavy volume of traffic. It is characterized by high speed and rapid acceleration passenger rail cars operating singly or in multi-car trains on fixed rails; separate rights-of-way from which all other vehicular and foot traffic are excluded. . . ." *Id.*

(3) "Light rail (streetcar, tramway or trolley) is lightweight passenger rail cars operating singly (or in short, usually two-car trains) on fixed rails in right-of-way that is not separated from other traffic for much of the way. . . ." *Id.*

SCRRA's costs not covered by farebox revenues are funded by these five member agencies. To the extent that the decision below extends liability under FELA from the entity that actually operates and dispatches (that is, controls the movement of) freight operations to the five member agencies, the funds available to operate commuter rail service would thereby be diverted to matters other than provision of quality, reliable regional passenger service to the commuting public.

This Court has previously concluded that FELA, like other aspects of the federal scheme of railroad regulation, applies fully to state-owned freight railroads. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197 (1991). *Amicus* takes no position on the issue of whether employees of Petitioner who are involved in the provision of freight service on the Long Island Railroad division of MTA are covered by FELA.[5] However, *Amicus* submits that there is no justification to extend FELA coverage to any affiliate of a state-owned or controlled entity when that other entity and not the affiliate is the one that has some connection to the interstate freight network, especially when the employees of the affiliate are protected by other workers' compensation arrangements.

## SUMMARY OF ARGUMENT

In the decision below, the Second Circuit incorrectly extended the reach of one aspect of the federal railroad regulatory scheme to a group of employers and employees that Congress has specifically determined should remain outside the grasp of that system. Congress has correctly con-

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[5] It is not clear whether there are any such employees remaining since LIRR has contracted with a short line railroad, the New York and Atlantic Railway Company, to operate the freight service on the lines of the LIRR. *See New York & Atlantic Railway Company—Operation Exemption—The Long Island Rail Road Company*, Finance Docket No. 33300, *slip. op.*, 1997 WL 7533 (S.T.B. 1997)

cluded that employees whose work primarily affects intrastate transportaion should remain outside the scope of the federal regulation of the rail network. The Second Circuit, however, has impermissibly extended further the reach of FELA.

1. The inclusion of MTA as an employer covered by FELA is inconsistent with the otherwise consistent federal approach to transit systems. The Railroad Retirement Act of 1974, 45 U.S.C. §231 (2003), the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*, (2003) the Railway Labor Act, 45 U.S.C. §151, *et seq.,* (2003) and even the ICC Termination Act of 1995, 49 U.S.C. §§10101 *et seq.*, (2003) all exclude from their coverage electric, interurban railroads that are not connected to the general freight transportation system. FELA also excludes wholly intrastate operations and mandates that an interstate nexus be present before the statute is applicable. The Second Circuit decision expands the scope of FELA to areas that do not have that necessary interstate nexus.

2. a. Exposing public transit agencies to FELA coverage would present an unwarranted and potentially unaffordable drain on the public treasury. Both farebox and local tax revenues fund SCRRA and other similarly situated public agencies that manage transit systems. The potential for uncertain and potentially enormous liability for agencies created and underwritten with the expectation of participation in state workers compensation schemes is not only unwarranted but bears the potential for defeating the ability of these agencies to fulfill their public purposes. Public agency employees cannot argue, as railroad workers could when FELA was first enacted, that they are left without protection. Each state has workers' compensation systems that compensate employees for injuries sustained while on the job.

b. The Second Circuit Decision will undercut the ability of state and local agencies to organize transit systems in a way

that maximizes efficiency and minimizes the public funds necessary to provide all services required to provide this service to the public. Currently, agencies that operate more than one mode of service may consolidate some functions to reduce costs, which is a valuable and proper endeavor for public agencies. The Second Circuit's decision will restrict their willingness to do that.

## STATEMENT OF THE CASE

*Amicus* SCRRA adopts the Statement of the Case that is set forth in the Petition for a Writ of Certiorari.

## ARGUMENT

### I. THE SECOND CIRCUIT'S EXTENSION OF FELA COVERAGE TO AN ADDITIONAL CATEGORY OF PUBLIC AGENCY EMPLOYERS IS CONTRARY TO THE FEDERAL SYSTEM FOR REGULATION OF RAILROADS AND VIOLATES IMPORTANT PUBLIC POLICY OBJECTIVES.

*Amicus* SCRRA has carefully structured its operations and its relationships with its member agencies to preserve the distinction between (1) those aspects of the commuter rail operation that have a nexus with, and an impact on, the interstate freight network, and (2) the wholly intrastate transit operations of the member agencies and of SCRRA itself. The Second Circuit's Decision disrupts that structure to the disadvantage of the local governments and that segment of the public that relies on SCRRA's Metrolink service as an alternative to congested highways and as a way to help reduce air pollution in the Los Angeles region.

### A. FELA, Like Other Federal Statutes, Only Governs the Operation of Railroads That Have a Nexus to Interstate Commerce.

FELA, by its own terms, is a consistent part of the statutory and regulatory structure that governs the nation's railroads. Until now, its coverage has extended only to those railroads and their employees that were involved in interstate commerce. The decision of the Second Circuit unnecessarily and improperly expands its scope.

The statute applies to:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, . . . .

45 U.S.C. § 51 (2003). Any such rail carrier "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." *Id.* To ensure that there is no confusion as to who is covered by the statute, Congress emphasized that:

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

*Id.*

This arrangement tracks the remainder of the federal railroad regulatory structure, which specifically excludes the entirely local operations of "street, electric and interurban

railways." *E.g.*, Railroad Retirement Act of 1974, 45 U.S.C. § 231(a)(2)(ii) (2003) (excluding from the definition of covered employer "any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power"); Railway Labor Act, 45 U.S.C. § 151, First (2003) (excluding from the definition of covered employer ". . . any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power"); ICC Termination Act of 1995, 49 U.S.C. § 10501(c)(2) (2003) ("Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority"). Indeed, courts reviewing attempts to bring local transit properties within the ambit of FELA's jurisdictional sweep have routinely recognized the statute's limitation on the availability of its remedies. *E.g., Felton v. Southeastern Pa. Transp. Auth.*, 952 F.2d 59 (3rd Cir. 1991).

The instant case presents neither a legal or factual basis nor any public policy reason for expanding the reach of one of these federal statues beyond the clear limitations imposed by Congress. While MTA may be a common carrier, as both the District Court[6] and the Second Circuit have held, not all common carriers are within the reach of FELA. Only those that engage in interstate commerce belong in that category. MTA's status as a common carrier does not mean that FELA must apply.

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[6] *Greene v. Long Island R. R. Co.*, 99 F. Supp. 2d 268, 270 (E.D. N.Y. 2000) (. . . "the court holds, reluctantly, that the MTA is a common carrier within the meaning of the statute").

Nor does the nexus between (1) an arm of MTA over which MTA exercises some managerial supervision, and (2) the interstate freight rail system, compel the result reached by the Court below. The Long Island Railroad decided in 1997 to contract with a short line, freight railroad to provide the freight service over its lines. *See New York & Atlantic Railway Company—Operation Exemption—The Long Island Rail Road Company, supra.* It is critical to note that the contract between the Long Island Railroad and New York & Atlantic Railway Company ("NY&A") grants to NY&A the exclusive right to operate the freight services as well as other freight operations. *Id.*

This contractual relationship further attenuates the connection between MTA management and the actual operation of the interstate service that might otherwise justify bringing MTA's personnel into coverage under FELA. While MTA may have some oversight over the contractual relationship, it cannot accurately be described as "engaging in" interstate commerce.

LIRR's commuter services, which the lower court used as the nexus to bring MTA within the scope of FELA, function wholly within the State of New York. Even if, as the Second Circuit concluded, MTA personnel are directly involved in the essential business aspects of LIRR's commuter rail business operations, 280 F.3d at 239-240, the lower Courts' conclusion that this brings MTA within the ambit of a statute aimed at providing a remedy to workers injured in the course of their duties on an interstate rail carrier does not follow. Because the LIRR is principally a commuter rail carrier and does not provide freight service itself, but has arranged for a short line railroad to provide that service for it, the Second Circuit's decision cannot be correct.

### B. Sound Public Policy Militates Against Any Such Judicial Expansion of the Reach of FELA.

The same logic and public policies that have convinced Congress and courts faced with the question of FELA's scope to conclude that FELA should not and does not extend to intrastate transit operations, should drive this Court to now grant certiorari so that it can review the Second Circuit's unwarranted expansion of the statute's reach. MTA, like other transit agencies around the country including *Amicus*, has carefully created an organization that preserves the separateness of the various public transportation modes. MTA has contracted away the operation of the freight service provided on the lines of its component entity, the Long Island Railroad. State workers' compensation statutes cover its employees who are not directly involved in any remaining freight-service related functions of the LIRR. The same can be said about the employees of *Amicus* and its member agencies. *See* Cal. Lab. Code § 3200 *et seq.* (West 2003); *Lenane v. Continental Maritime of San Diego, Inc.* 72 Cal.Rptr.2d 121 (Cal. App. 4th 1998), *rev. denied* (May 20, 1998), *cert. denied* 525 U.S. 1002 (1998) (legal theory supporting workers' compensation benefits as exclusive remedy against employer for injuries sustained in course of employment is a presumed compensation bargain, pursuant to which employer assumes liability without regard to fault in exchange for limitations on amount of liability, and employee is afforded swift and certain benefits without having to prove fault but gives up wider range of damages available in tort.)

Judge Wexler, in the District Court opinion below, before reaching an ultimately incorrect decision about the need to bring MTA within FELA's scope, explained part of the reason why public policy does not support such a decision, stating:

> In a time when other workers, including those involved in far more hazardous situations, are covered by a comprehensive scheme of workers' compensation bene-

> fits, it is archaic and unwarranted for railroad workers to be entitled to a different standard that takes them outside of the realm of the typical employee. Municipal police officers and firefighters are engaged in professions that daily subject them to situations far more dangerous than that of the typical railroad worker. Yet, if these individuals, who put their lives at peril every day, are injured on the job, they are covered by workers compensation benefits.
>
> Each and every railroad worker, on the other hand, from the ticket taker to the administrative office worker, may collect damages under FELA, for an on the job injury. In such cases, the railroad employee is entitled to recover by showing that their injury is attributable to the negligence, however slight, of their employer . . . [citation omitted] While a statutory scheme aimed at protecting railroad workers from the "physical dangers of railroading" may have been necessary in 1908, when FELA was passed, that is no longer the case.

99 F. Supp. 2d at 270.

The second and even more compelling public policy reason for limiting FELA's reach into the treasuries of public agencies that are not involved in interstate freight operations is summarized succinctly in a Comment in St. John's Law Review that discusses the instant case. Jeffrey Amato, Comment, *The MTA, It's Not "Going Your Way"—Liability of the Metropolitan Transportation Authority Under FELA: Greene v. Long Island R.R.*, 75 St. John's L.Rev. 113, 132-135 (2001). In short, FELA produces large but unpredictable judgments that simply do not promote railroad safety. Rather, these judgments promote feelings of inequity and hardship among those injured employees who receive no

compensation at all when they are unable to demonstrate that their employer was negligent. According to the author:

> The costs of fault-based compensation systems have been proven . . . and they have failed to promote safety in the railroad industry. . . .
>
> . . . .
>
> The most compelling policy argument against FELA liability is the statute's impact on safety and profitability of railroads. . . . The FELA is seen as the nemesis of railroads, . . . and a huge roadblock in the way of profitability. . . . Most notably, FELA has had a tremendous adverse effect on the railroad safety by discouraging productive communications regarding accident cases, and thereby directly reducing preventative measures. . . . The fact remains that FELA creates a substantial impediment to the management, implementation and administration of general railroad safety programs.

Amato, *supra* at 134-135 (footnotes omitted).

The public treasuries that fund the operations of transit agencies can ill-afford the extra burden associated with a negligence based system, rather than one that provides compensation to workers based on the extent of the injury suffered and the duration of the period that the injury will keep the employee out of the workplace. *Amicus* and its member agencies, like MTA and its component parts, have created an organization that preserves the distinction between and among the services provided. This structure presents a system that allocates risk and cost, as well as statutory and regulatory burdens and compliance, to the constituent part that has the direct nexus with the particular operation, and thus the ability to plan and contract for financial exposure and regulatory oversight. Thus, while the SCRRA member agencies have been ruled to be carriers providing transportation subject to the jurisdiction of the STB under 49 U.S.C. Subt. IV (2003), no member of their respective work forces

has been considered to be covered by FELA because none of them undertakes a direct role in the provision of the freight service that occurs on the lines they own. Like the freight carrier that provides the service on the lines of the Long Island Railroad, the freight railroads that operate on SCRRA's member agency lines are carriers subject to FELA and the remaining aspects of the federal rail regulatory system. Preserving these agencies' coverage under the California workers compensation system has enabled them to plan for and insure against the risk of workplace injury. Bringing any portion of that work force within the scope of FELA could impose the same substantial costs, with the same extreme financial consequences as Amato, *supra*, identified as the source of major financial difficulties for the freight railroads.

The same is true for MTA. *Amicus*, like MTA and other similarly situated commuter agencies, has successfully created a structure that strives for safety of the workers and provides compensation to them when they are injured. The Second Circuit's Decision in the instant case places SCRRA's arrangement, like MTA's and those of other agencies nationwide, at risk. It is contrary to both the law and sound public policy, and should be reviewed by this Court.

## CONCLUSION

The decision below marks a legally unfounded and wholly unnecessary expansion of the reach of a federal statute that has already been severely criticized for the financial havoc it creates in the railroad workplace. Congress was quite clear in its direction that this statute applies only to those railroads that are actually engaged in interstate commerce. By reaching to include within the scope of FELA a public agency that owns a subsidiary that owns track on which freight services are provided by another railroad, the Second Circuit has started down a path that Congress did not envision. To prevent this expansion of FELA to other agencies that have a connection with the freight system but do not "engage" in the provision of any aspect of that service themselves, this Court should grant MTA's Petition for a Writ of Certiorari to permit review of the significant and potentially destructive decision below.

Respectfully submitted,

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No. 02-1173

# In the Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

*Petitioner*,

v.

SEAN GREENE,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF *AMICUS CURIAE* FOR THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY IN SUPPORT OF PETITIONER

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14 pp

## QUESTIONS PRESENTED

The *amicus curiae* will address the following questions:

1.

Whether the Second Circuit has misstated constitutional law by failing to recognize that when sovereign immunity for authorities operating rail transportation is expressly waived within a state's workers' compensation act, actions by employees of those authorities for bodily injuries arising out of and in the course of employment can only be brought under workers' compensation since the waiver of sovereign immunity is limited by its context.

2.

Whether the Second Circuit's test for Federal Employers' Liability Act coverage unreasonably extends to categories of employees such as bus drivers who necessarily further and substantially affect rail transportation when a rapid transit system is designed to seamlessly interface bus and rail in a unity of facilities.

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# BRIEF *AMICUS CURIAE* OF THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICUS CURIAE*[1]

The Metropolitan Atlanta Rapid Transit Authority ("MARTA") is a local public authority created by the State of Georgia as a joint public instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinnett. *Metropolitan Atlanta Rapid Transit Authority Act of 1965,* 1965 Ga. Laws p. 2243 §4. MARTA operates a bus and rail transit system consisting of a fleet of 691 buses traversing 1,128 bus route miles and a fleet of 294 railcars traversing 47 miles of track. Buses feed passengers into the rail system and disperse passengers into the neighborhoods. MARTA operates 38 rail stations including one inside the Atlanta Hartsfield International Airport. All but five rail stations are serviced by bus routes in an integrated seamless transportation system.

As an operator of rail transportation MARTA is potentially subject to employers' liability acts. In the era before state workers' compensation systems became widespread, the Federal Employers' Liability Act of 1908 ("FELA"), 35 Stat. 65, 45 U.S.C.A §51, *et sequitur,* was copied by many states in order to cover purely intrastate rail transportation. In 1909 Georgia passed the Georgia Employers' Liability Act

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[1] The written consents of the parties to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae* and its counsel made a monetary contribution to the preparation and submission of this brief.

("GELA"), 1909 Ga. Laws p.160, Ga. Code Ann. §34-7-40 (1998), *et sequitur,* for railroad workers not covered under FELA. Hence, an operator of rail transportation in Georgia would necessarily be covered by one of the employers' liability acts.

The Georgia Court of Appeals has ruled that MARTA is not subject to employers' liability acts since MARTA's waiver of sovereign immunity contemplated subjecting the authority only to workers' compensation act liability for employee injuries arising out of and in the course of employment. *Williams v. Metropolitan Atlanta Rapid Transit Authority,* 247 Ga. App. 52 (2000). Thus, the Second Circuit's ruling subjecting local authorities to employers' liability acts is in direct conflict with Georgia law. The Second Circuit's failure to address the import of a waiver of sovereign immunity within a workers compensation act jeopardizes workers' compensation systems nationwide.

How federal courts interpret FELA will impact MARTA. First, federal court interpretation and application of FELA will guide the Georgia courts in their interpretation and application of GELA. Second, MARTA could potentially be subject to FELA should the Second Circuit's logic be extended nationwide. Arguably, MARTA is currently a part of the interstate rail transportation system because its standard gauge railcars can be transported over the national rail system and delivered via a connection thereto. Arguably, MARTA is currently an integral part of the interstate transportation system by virtue of its rail station inside Atlanta's Hartsfield International Airport being the final mode for interstate and international movement of passengers. Certainly, any plans MARTA may have for future acquisition of, or integration with, commuter rail will subject MARTA to FELA under the Second Circuit's rationale. If the Second Circuit's opinion stands, MARTA and other authorities nationwide will have workers' compensation coverage for traditionally non-rail employees supplanted by FELA.

## SUMMARY OF ARGUMENT

The Second Circuit's decision is erroneous for failure to properly answer the fundamental question of whether New York had waived sovereign immunity against actions by employees of the Metropolitan Transit Authority ("MTA") for bodily injuries arising out of and in the course of employment. The state of New York did expressly waive sovereign immunity for its authorities in New York's workers' compensation act. N.Y. Work. Comp. §2 (McKinney 1992). The Second Circuit failed to consider the import of this waiver. New York waived sovereign immunity for its authorities to be sued by their employees for bodily injuries arising out of and in the course of employment under workers' compensation – not under FELA.

The New York Workers' Compensation Act's express inclusion of authorities as employers subject to the act is paralleled by Georgia. In Georgia, the courts have interpreted this express waiver contained in the workers' compensation act as meaning that sovereign immunity is not waived for purposes of employers' liability acts but is waived only for purposes of the workers' compensation act.

Regardless of sovereign immunity, the Second Circuit's test for FELA coverage is nonsensical when applied to rapid transit authorities. Under the Second Circuit's test of "furthers or substantially affects transportation" a rapid transit system's bus drivers and rail station bus bay supervisors would necessarily be covered under FELA because of their critical roles in an integrated seamless transportation system. Such an inclusion is a farce.

## ARGUMENT

### I. NO ACTION CAN BE MAINTAINED UNLESS THE STATE HAS WAIVED SOVEREIGN IMMUNITY.

#### A. The Correct Test Should Be Whether A State Has Consented To Be Sued By Injured Workers As Enunciated In *Alden v. Maine.*

In *Alden v. Maine,* 527 U.S. 706 (1999), this Court interpreted and restated its decisions in *Parden v. Terminal Railway of Alabama Docks Dept.,* 377 U.S. 184 (1964) and *Hilton v. South Carolina Public Railways Commission,* 502 U.S. 197 (1991). Those decisions were explained by *Alden* to stand for "the narrow proposition that certain States had consented to be sued by injured workers covered by FELA, at least in their own courts." *Alden* at 737-38. Thus when examining the case *sub judice* the proper analysis must first begin by answering the question whether New York consented to the MTA being sued under FELA. Both Georgia and New York contain express waivers of sovereign immunity for public authorities in their workers compensation acts. Georgia has already interpreted its provision and thus offers persuasive precedent for the interpretation of New York's provision.

#### B. The Georgia Court Of Appeals Has Held That An Express Inclusion Of Public Authorities Under Georgia's Workers Compensation Act Precludes Tort Actions Under Employers' Liability Acts.

In *Williams v. Metropolitan Atlanta Rapid Transit Authority,* 247 Ga. App. 52 (2000), a rail operator was injured in a train derailment and sued MARTA under GELA. The Georgia Workers' Compensation Act specifically includes authorities in its definition of employer that reads, in

pertinent part, "'Employer' shall include the State of Georgia and all departments, instrumentalities, and authorities thereof." Ga. Code Ann. §34-9-1(3) (1998). The Act excludes railroad workers who would be covered under GELA by a provision reading, in pertinent part, "This chapter shall not apply to common carriers by railroad engaged in intrastate trade or commerce." Ga. Code Ann. §34-9-2(a) (1998). The Act also excludes railroad workers who would be covered under FELA by a provision reading, in pertinent part, "This chapter shall not apply to any common carrier by railroad engaging in commerce between any of the several states." Ga. Code Ann. §34-9-2(b) (1998).

The Georgia Court of Appeals was confronted with the choice between the inclusion of authorities as employers subject to the workers' compensation act and the exclusion of authorities as common carriers by railroad subject to the employers' liability acts. The Georgia Court of Appeals stated "MARTA is a common carrier and operates rail transportation." *Williams* at 52. Clearly, by itself, this statement would warrant employers' liability act coverage. However, the Georgia Court of Appeals was more impressed by the unequivocal categorical inclusion of all public employers under workers' compensation: "authorities are subject to workers' compensation by express legislative mandate." *Id.* at 53. Consequently, the court determined that MARTA's waiver of sovereign immunity "was conditioned upon MARTA's being governed by the [Workers' Compensation Act] as all other authorities." *Id.*

Under Georgia law, MARTA has not waived its sovereign immunity against tort actions brought under GELA or FELA for bodily injuries to employees arising out of and in the course of employment.

### C. Like Georgia, New York Has Expressly Defined Its Public Authorities As Employers Subject To The New York Workers' Compensation Act.

New York has an express waiver of sovereign immunity in its workers compensation act which reads, in pertinent part: "'Employer' ... means ... the state, a municipal corporation, fire district or other political subdivision of the state, and every authority or commission heretofore or hereafter continued or created by the public authorities law." N.Y. Work. Comp. §2 (McKinney 1992). The legislature clearly manifested an unequivocal categorical inclusion of authorities under the workers' compensation act. The MTA, as a New York authority, has had its sovereign immunity clearly waived by the New York legislature for the purposes of workers' compensation. The intent of the New York legislature is readily apparent. As in Georgia, New York has waived sovereign immunity against employee claims for bodily injury arising out of and in the course of employment on the condition that such claims be pursued under workers' compensation.

The Second Circuit never considered the black letter law of New York. If the Second Circuit had followed this Court's interpretation in *Alden,* it should have ruled that New York did not consent to be sued by workers under FELA. Allowing the Second Circuit opinion to stand will establish bad case law precedent affecting other rapid transit authorities nationwide.

## II. THE SECOND CIRCUIT'S TEST FOR COVERAGE UNDER FELA ILLOGICALLY EXTENDS TO BUS OPERATORS.

In order to extend FELA coverage to a MTA employee, the Second Circuit had to find a nexus to the Long Island Railroad. Plaintiff Greene's duties as a MTA police officer

included patrolling the Long Island Railroad's parking lot. The Second Circuit relied on prior Supreme Court precedent holding: "[t]he test for coverage under [FELA] is not whether the employee is engaged in transportation but rather whether what he does in any way furthers or substantially affects transportation. Nor are the benefits of the Act limited to those exposed to the special hazards of the railroad industry." *Greene v. Long Island RR Co.*, 280 F.3d 224, 229-30 (2nd Cir. 2002) (cits. omitted. quoting from *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, 505-6 (1956)). The Second Circuit further justified application of this test by citing a 1911 case standing for the proposition that FELA coverage is warranted where there is a "unity of the railroad's lines and the terminal facilities [wharves and docks for vessels] ... necessary in the transportation or delivery of the interstate and foreign freight transported by the lines of the [railroad]." *Greene* at 231 (cits. ommited. quoting from *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 522-23 (1911)). Since patrolling the Long Island Railroad parking lot furthered or substantially affected rail travel from a terminal where there was a necessary unity in facilities and lines to transport passengers, the Second Circuit applied FELA.

Under this logic, all employees of a rapid transit authority must necessarily be under FELA since bus-rail systems are designed to seamlessly interface. Buses feed passengers into the rail system at rail stations and disperse them back into the neighborhoods. At MARTA the main rail stations are the nodes from which the bus routes begin and end. Without the buses there would be minimal passengers in the rail system. Without the rail system, buses would have no one to pick up at the rail station nodes.

Rail stations serviced by buses are designed to integrate bus-rail transfer without re-ticketing or requiring transfer chits. Bus bays are designed so buses can dock inside rail stations for loading and unloading. The bus bays at the rail stations create "a unity of the railroad's lines and the terminal

facilities and [are] necessary in the transportation or delivery of [passengers]." Hence bus operators dropping off and picking up passengers at the rail stations would have to be covered by FELA. So too would be their supervisors at the rail station's bus bay and the station agents posted there for customer service. Likewise, rail station parking lot attendants would be covered just as would be park-and-ride lot attendants at remote suburban bus stops. Everything in a rapid transit system is designed to "further and substantially affect" rail transportation in a "unity of railroad lines and bus facilities."

The tests designed to apply to railroads at the penultimate turn of the century simply do not logically apply to rapid transit authorities today. The only solution to this conundrum is to apply the common sense approach offered by sovereign immunity. Rapid transit authorities were created long after FELA and state workers' compensation acts. Congress had the opportunity to make all rapid transit authorities subject to FELA when it passed the Urban Mass Transportation Act of 1964, Pub. L. 88-365, 78 Stat. 302 (1964). Congress chose not to do so. The state legislatures had the opportunity to choose whether they wanted to waive sovereign immunity for purposes of employers' liability acts or for purposes of workers' compensation acts. Where a state legislature has explicitly waived sovereign immunity for its authorities in the workers' compensation act, the choice has been made.

## CONCLUSION

The petition for a writ of certiorari should be granted and the Second Circuit's decision should be reversed.

Respectfully submitted.

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No. 02-1173

IN THE
# Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
*Petitioner,*

*v.*

SEAN GREENE,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF PETITIONER

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## BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF PETITIONER

## INTEREST OF THE AMICUS

Amicus Curiae Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a statutorily-created body corporate and politic. SEPTA operates a mass transit system in the Philadelphia metropolitan area, and outside the metropolitan area to the extent necessary for the operation of an integrated system. 74 Pa. C.S.A. §1701 (a), formerly 74 Pa. C.S.A. §1501 (a) (repealed). SEPTA provides bus, trolley, trackless trolley, subway, elevated and commuter rail services. As is the case with its bus, subway and trolley service, almost all of SEPTA's commuter rail service is provided within those five counties of Southeastern Pennsylvania that comprise the Philadelphia metropolitan area. Only three commuter lines provide links to cities out of state: one to Wilmington, Delaware, which is operated pursuant to a co-operative arrangement with the state of Delaware, and the two lines to Trenton and West Trenton, New Jersey. In the early 1980's, SEPTA was deemed to be a commuter authority under 45 U.S.C. §1004 and took over operation of certain inter-city commuter rail lines that had previously been operated by Conrail.[1]

SEPTA's enabling statute provides for a board of directors, which includes individuals appointed by the governor of Pennsylvania, the leadership of the General Assembly of Pennsylvania, and representatives from the five

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1. Pursuant to Rule 37.6 of the United States Supreme Court, SEPTA certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than SEPTA has made a monetary contribution to this brief in preparation or submission. The parties have provided letters to SEPTA granting consent or have lodged letters with the Court expressing their blanket consent to the filing of the amicus brief.

Pennsylvania counties that comprise the Philadelphia metropolitan area. In contrast to the structure adopted for the Long Island Railroad, SEPTA's enabling statute did not create two separate entities to operate the transit and commuter rail operations; instead SEPTA's commuter railroad is operated as a division of SEPTA.

The SEPTA workforce is comprised of approximately 9,100 employees. While most are subject to state workers' compensation provisions, approximately 1,200 employees are directly involved in railroad operations and are subject to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §51 *et seq.* These railroad division employees are provided pension benefits subject to standards imposed by the Railroad Retirement Act, 45 U.S.C. §231, *et seq.;* SEPTA's non-railroad employees, on the other hand, receive standard Social Security coverage. The railroad hourly employees and the hourly employees in the non-railroad operations are subject to different collective bargaining agreements, are represented by different unions, and are subject to different labor laws. Non-railroad employees are subject to the Pennsylvania Public Employe Relations Act, 43 P.S. 1101 *et seq.,* and railroad employees are subject to the Federal Railway Labor Act, 45 U.S.C. §151 *et seq.*

Under its enabling act, SEPTA is deemed to be exercising the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof. The Pennsylvania Supreme Court has held that SEPTA is a Commonwealth Agency for purposes of determining when the agency can be sued. Accordingly, under Pennsylvania law, negligence claims brought against SEPTA are limited to the exceptions set forth in Pennsylvania's Sovereign Immunity Statute. 42 Pa. C.S.A. §8501, *et seq.* See *Spencer v. SEPTA,* 525 Pa. 466, 581 A2d 565 (1990). That statute imposes a cap on the payment of damages for tort actions.

SEPTA is currently operating at a deficit. It has never operated at a profit. Its revenue is derived from the farebox, transit advertising and real estate rentals. SEPTA's operations and capital needs, however, are largely funded through monies received from the federal government and the Commonwealth of Pennsylvania, and from the various counties in which SEPTA operates on a proportionate basis. In the past ten years, SEPTA has had to initiate two reduction in force plans and various hiring freezes, particularly with reference to management and administrative staff.

Based on SEPTA's status as a Commonwealth Agency and recent litigation instituted asserting a FELA cause of action against it, SEPTA has an interest in this case. SEPTA has been sued by a salaried employee who does not work for SEPTA's Railroad Division. While inspecting a contractor's work at a railroad location, the plaintiff allegedly slipped and fell in a commuter parking lot. The station is on a line that does not operate interstate and at which no interstate trains stop. This accident occurred over two years ago and the employee collected worker's compensation benefits. SEPTA has always treated the employee as subject to Social Security and not as if he were eligible for Railroad Retirement Benefits. After the Second Circuit opinion in this case, however, the employee sued SEPTA under the FELA. His lawyer has readily admitted that the suit was brought based on the recent holding in *Greene v. Long Island Railroad Company*, 280 F.3d 229 (2nd Cir. 2002).

Litigation of this kind will significantly increase SEPTA's exposure to damage claims brought by its employees.

## SUMMARY OF ARGUMENT

Amicus SEPTA respectfully suggests that the opinion by the Court of Appeals for the Second Circuit impermissibly expands the scope of FELA coverage. The Court of Appeals' expansive holding applying intra-corporate principles based on a parent-subsidiary analysis has no place in

determining the liability of a government agency. In contrast to the attempts by the District Court in *Greene* to define who is and is not a railroad employee, the Court of Appeals has provided no guidance as to which employees are in fact covered by the FELA and the result it has reached will necessarily increase litigation on this subject. In fact, SEPTA has already been sued in one case attempting to advance the theory set forth in the *Greene* decision.

Under the Court of Appeals' reasoning, whenever a state transit authority operates a railroad, the entire transit authority becomes subject to FELA and every employee becomes, in effect, a railroad worker, irrespective of the duties he/she performs. This is not in keeping with the original purposes of the FELA. Moreover, such a holding would be financially ruinous. Any holding that extends FELA coverage to all public transit agency employees will expose already fiscally strapped public transit agencies to increased litigation costs associated with defending FELA claims and to unpredictable jury results. Indeed, to avoid this result, agencies such as SEPTA may be forced to reconsider whether they can continue to provide railroad commuter service.

This new rule enunciated by the Court of Appeals will also interfere with employees' rights to be covered by Social Security retirement plans and will impact on their collective bargaining agreements. The increased costs associated with permitting every employee to litigate and collect for pain and suffering for work related injuries will be very damaging to state agencies that operate with limited budgets and continuing capital needs. SEPTA therefore urges this Court to intervene and make it clear that state agencies are not subject to the FELA or at least limit FELA to its originally intended scope: those employees who are directly involved in interstate railroad activities or directly and substantially affect such commerce.

## ARGUMENT

### A. CERTIORARI SHOULD BE GRANTED BECAUSE THE FELA WAS NOT INTENDED TO APPLY TO STATE GOVERNMENT AGENCIES

The holding in this case is not consistent with the original purpose of the FELA. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 568 (1987), the courts were directed to consider both the "nature of the injury and the character of the tortious activity" when deciding whether the FELA could be invoked. In the present case, the alleged tortious activity was the failure to provide a "safer car" for an employee who was injured in a routine traffic accident on the way to a railroad station – surely a purely local activity that has no impact on interstate rail service or commerce. The application of the FELA to this run-of-the-mill local traffic accident contravenes the purpose of the FELA, the principles of federalism, and infringes on a state's sovereign immunity.

SEPTA's status as an instrumentality of the Commonwealth of Pennsylvania is undeniable. SEPTA was created when the General Assembly enacted "The Metropolitan Transportation Authorities Act of 1963". 66 Pa. C.S.A. §2001 (repealed). In that statute, SEPTA was given the right to sue and be sued. 66 Pa. C.S.A. §2004(d)(2) (repealed) now – 74 Pa. C.S.A. §1701, *et seq.* Nevertheless, SEPTA is immune from suit unless a plaintiff has a cause of action that falls within an exception to Pennsylvania's Sovereign Immunity Act. *See* The Metropolitan Transportation Act of 1994,[2] 74 Pa. C.S.A. §1741(a)(2). In fact, 74 Pa.C.S.A. §1711(3) specifically states:

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2. SEPTA, pursuant to statutory authority, can exercise powers of condemnation and eminent domain. 74 Pa. C.S.A. §1741 (12) and 74 Pa. C.S.A. §1742(6).

It is hereby declared to be the intent of the General Assembly that an authority created or existing under this chapter . . . shall continue to enjoy sovereign and official immunity, as provided reaffirmed; (specific waiver), and shall remain immune from suit except as provided by and subject to the provisions of 42 Pa. C.S. §8501 (relating to definitions) through §8528 (relating to limitations on damages)".

To understand the scope of SEPTA's immunity, it is necessary to review the legislative scheme.

1 Pa. C.S. §2310 states:

**§2310. Sovereign Immunity Reaffirmed Specific Waiver**

Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of title 42 (relating to judiciary and judicial procedure) unless otherwise specifically authorized by statute.

42 Pa. C.S.A. §8521 (a) states:

**§8521. Sovereign immunity generally**

(a) **General rule** – Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa. C.S. §2310 (relating to

sovereign immunity reaffirmed; specific waiver) or otherwise.

Section 8522 sets forth the exceptions to sovereign immunity applicable to Commonwealth agencies such as SEPTA.[3] Consequently, SEPTA is immune from liability unless the claim is based on one of the exceptions to sovereign immunity found in 42 Pa. C.S. §8522.

There is an abundance of case law that SEPTA – an agency and instrumentality of the Commonwealth – cannot be sued for monetary damages unless sovereign immunity has been explicitly waived. This longstanding principle of sovereign immunity is written into the Constitution of the Commonwealth of Pennsylvania. Article 11 provides that "suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct." *See, e.g., Chittister v. Dept. of Community and Economic Development,* 226 F.3d 223 (3rd Cir. 2000) (Pennsylvania state agency had not consented to suit under the FMLA.)

While the Eleventh Amendment governs the jurisdiction of federal courts over the states and immunities from certain state actions, it is not the source of a state's immunity from actions in a state's own courts. *See Alden v. Maine,* 527 U.S. 706 (1999). A state's immunity from suit in its own courts is derived from common law and the state immunity derived from its constitution. A state agency cannot be deemed to have consented to suit in federal or state court simply because it operates a railroad. Indeed, the doctrine of constructive waiver has effectively been repudiated by recent precedent. *Will v. Michigan Depart-*

3. There are nine exceptions: negligence claims based on operation of motor vehicles; injuries due to a medical professional; liability that is derived from a defect of the real estate; injuries caused by personal property; potholes and dangerous conditions of highways; custody or control of animals; liquor state sales; acts of members of national guard; vaccines and toxoids.

*ment of State Police,* 491 U.S. 58, 65 (1988) (if Congress intended to alter the usual constitutional balance between the states and the federal government the intention must be made clear); *Kimmel v. Florida Bd. of Regents,* 528 U.S. 62 (2000) (Congress must demonstrate a clear intent to have ADEA apply to the state); *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001) (Congress must demonstrate a clear intent to have the ADA apply to the states.)[4] It follows that there is no basis for permitting a FELA action to proceed against a state created railroad in either state or federal court. *See, e.g., Alabama State Docks Terminal Railway v. Lyles,* 797 So. 2d 432 (Ala. 2001).

When the Northeastern Regional Rail Reorganization Act went into effect, SEPTA – an agency of the Commonwealth of Pennsylvania – could have contracted with Amtrak Commuter, another entity, or operate the railroad itself. SEPTA decided to operate its rail division as exactly that: a division of SEPTA's mass transit operations.

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4. In *Parden v. Terminal Railway of Alabama State Docks Department,* 377 U.S. 184 (1964), a five to four majority held that by operating a railroad in interstate commerce Alabama had waived its immunity to suit. Emphasis was placed on the fact that Alabama had entered the rail business twenty years after the FELA had been enacted. The dissenting Justices did not believe that the requisite intent of Congress to extend the FELA to the states or that a state could waive immunity by operating a railroad. Subsequently, a majority of the Supreme Court agreed with the reasoning of the dissenters. In *Welch v. Texas Department of Highways & Public Transportation,* 483 U.S. 468 (1987), the Court expressly overruled the reasoning of *Parden* in an action brought under the Jones Act. *Id.* at 478. The Court held "to the extent that *Parden v. Terminal Railway* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Id.* In *Hilton v. South Carolina Public Railways Commission,* 502 U.S. 197 (1991) an FELA action filed in state court was found to be maintainable notwithstanding the overruling of *Parden* in *Welch. Id.* at 199, 204-05. The court found that the government entity had consented to jurisdiction in state court by voluntarily operating a railroad. In this instance, SEPTA did not choose to voluntarily operate interstate rail service.

It is true that courts have held that the employees of the railroad division are subject to the FELA, but that is no reason to make all of SEPTA's *other* operations subject to the FELA. *See, e.g., Felton v. SEPTA,* 952 F.2d 59 (3rd Cir. 1989). This was never intended by anyone. After all, the act that provided for SEPTA to incorporate inter-state lines did not mention the FELA as an applicable statute. See 45 U.S.C. §591 (repealed). Indeed, the successor statute refers to the rail operations as being governed by safety provisions – and the FELA does not contain any safety provisions. See 49 U.S.C. §20101. To expand the FELA to all divisions of SEPTA would be inconsistent with the intent of the Act.

The Second Circuit holding in *Greene* taken to its logical conclusion is that if an entity operates a railroad then all employees are railroad employees. This holding greatly expands the FELA and fails to consider whether the services provided by the employee further or affect interstate transportation. *See, e.g., Reed v. Pennsylvania R. Co.,* 351 U.S. 502, 507 (1956); *Hall v. Southern Pac. Co.,* 71 F. Supp. 21, 24-25 (N.D. Cal. 1944) (does employee do an act which laid the foundation for and was an act of another or subsequent act of interstate commerce or a step towards it). Further, the Second Circuit would completely abandon the long recognized distinction between interstate railroads and urban railroads, such as trolleys and subways. Urban railroads have long been recognized as outside the scope of the FELA. *See Ohara v. Council Bluffs Street Railway Co. v. Interstate Commerce Commission,* 230 U.S. 324 (1913). Under the *Greene* holding, every operational component will now be deemed part of the railroad operations and this ignores the language of the statute that a covered employee of a carrier includes any employee whose duties "shall be in furtherance of interstate or foreign commerce, or shall in any way directly or closely and substantially affect such commerce." 45 U.S.C. §51 The intent behind the passage of the FELA was the concern over injuries to employees

engaged in the business of interstate railroads and the holding in *Greene* abandons that analysis.[5]

* * * *

After these lines were taken over from Amtrak, SEPTA treated all of these lines, which were originally part of Amtrak, as part of the Rail Division. The operation of SEPTA has been structured in a manner consistent with this need to distinguish between railroad employees and all of its other employees. There is no "interstate" aspect to the job of a porter who cleans a subway station in SEPTA's City Transit Division. Nevertheless, under the reasoning of the Court of Appeals, an individual who was injured because his chair collapsed in an office remote from a railroad location, while he was preparing bus schedules, will now be subject to the FELA merely because SEPTA operates a commuter rail line as one of its public transit operations. That employee could now bring a claim under the FELA even though his activities do not involve and have no significant impact upon interstate commerce. Moreover, this is plainly not the type of dangerous work that the FELA was meant to address. The Court of Appeals and the District Court holdings in *Greene* have completely abandoned the statutory mandate to determine whether the employee is, in fact, furthering interstate activities.

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5. At the time the FELA was enacted to meet the concerns that private companies were not addressing the needs of railroad employees, a state-owned railroad could not have been sued without its consent. State-owned railroads did not have to depend – as did privately owned railroads – on common law defenses, such as contributory negligence or the fellow-servant rule in order to escape liability for injuries to its employees. All state owned railroads would have had to do would be to invoke the defense of sovereign immunity. There is no reason to conclude that Congress intended by its enactment of the FELA to strip the states of this jealously guarded right of defense, when not even a hint of such an intent can be gleaned from the legislative history of the act. H.R. Rep. No. 1386, 60th Cong. 1st Sess. 1908.

Finally, there is no good reason to apply the parent-subsidiary or joint venture concept to a government agency simply to expand the coverage of the FELA. It makes no sense to adhere to corporate formalities imposed for private/profit corporations on a state agency. To impose such requirements on how a state chooses to carry out government functions interferes with the state's sovereign rights. Likewise, a "piercing" or "alter-ego" argument cannot result in a finding that the state transit agency should be deemed a railroad for all purposes. A common law "piercing" or "alter ego" test generally involves two components – (1) a disregard for corporate formalities and (2) a use of the corporation in a manner that promotes fraud or injustice. 38 A.L.R.3d 1102, §15. Assuming that one finds that corporate formalities were not adhered to, then counsel for the amicus suggests that no liability could ever be imposed as the second prong of a piercing test cannot be met. Piercing is an equitable remedy employed to prevent fraud or injustice. Fraud or injustice could never be established when assessing claims against a state agency. It would be absurd to hold that a sovereign state – which must consent to suit in the first instance – would have to engage in a fraud to shield its treasury from claims or that a state agency funded by the taxpayers was designed to promote fraud or injustice.

Under the reasoning of the Court of Appeals, any state agency that operates or provides support to a rail operation would be subject to the FELA. Indeed, taking the parent-subsidiary argument to its logical conclusion – *all* state employees would be subject to the FELA because it is the state itself that operates the railroad. This holding infringes on the state's sovereignty and improperly tells the state how it should operate its mass transit operations. By construing the FELA to cover all operations of a transit agency, the Court of Appeals has directly infringed on the right of the state to organize its agency in the most cost efficient use of resources and funding.

## B. THE EXPANSION OF THE FELA IS NOT WARRANTED WHEN THERE ARE WORKER'S COMPENSATION MECHANISMS IN PLACE AND THE EXTENSION OF THE FELA WILL JEOPARDIZE THE ABILITY OF AGENCIES TO FUNCTION

The FELA is a federal negligence statute. 45 U.S.C. §51 *et seq.* Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943). The basis of a recovery is that the railroad was negligent, that is "whether the employer's negligence had played any role in the harm and this standard of responsibility is based on foreseeability." See, e.g., *Gallick v. Baltimore & Ohio Railroad,* 372 U.S. 108 (1963).[6]

At the time that the FELA was enacted, the railroad industry was very different than it is today. The private railroads were collectively the largest employer in the country. See Herde, *FELA-Should It Be Abolished?* 17 Forum 407, 410 (1981). There was an abundance of labor, unions were virtually unknown, and few states had any type of worker's compensation or state disability provisions. See W.P.Keeton, D. Dobbs, and B. Keeton & D. Owen, *Posser and Keeton on the Law of Torts*, at 572-73 (5th Ed. 1984).[7]

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6. As it happens, the case law under the FELA has evolved to be virtually a strict liability statute resulting in increased litigation costs because it is virtually impossible to have a case dismissed prior to trial. Because the FELA only requires the slight evidence of negligence, thereby requiring less proof, only the slightest degree of evidence results in a question being raised for the trier of fact. See *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500 (1957), *reh. den.*, 353 U.S. 943 (1958).

7. Pennsylvania worker's compensation provisions do not exempt railroad workers and cover "all employees". If, in fact, a state has exempted railroad workers – which Pennsylvania has not – then FELA coverage could remain in place or it would be up to the state legislatures to amend or modify said statutes to address the needs of railroad employees. In *Hilton v. South Carolina Public Railways Commission, supra,* this Court stated that certain states had exempted railroad workers from coverage and it was concerned over changing long-standing employee relationships. This rationale, however, should not be controlling as it disregards the rights of individual states.

Railroad work was also considered to be very dangerous, with one of the highest accident rates in history, including fatalities. In fact, one railroad employee out of eight was injured and one out of every 125 was killed.[8]

Today, there is a debate on whether or not the railroad industry remains as dangerous as when the FELA was first enacted. See Babcock and Oldfather, *The Role of the Federal Employer's Liability Act in Railroad Safety,* 19 Trans. L. J. 881 (1990-1991). There is no debate that railroad employment has decreased continuously. In the time period from 1980 to 1989, railroad employment decreased by 40% and reportable injuries decreased by 60%. Nevertheless, the FELA payout during the same time period increased over 130% ($343 million to $789 million). See Baker, *Why Congress Should Repeal the Federal Employer's Liability Act of 1908,* 29 Harv. J. of Legis, 79, 104 (1992). In 1990, the average payout of a litigated FELA case was $166,000 as opposed to $42,000 in 1980. See 1990 Report of Claim and Litigation Expense-Association of American Railroads; Phillips, *FELA Revisited,* 52 Md. L. Rev. 1062 (1993) (lawsuits, which account for less than 11% of FELA claims represented 35% of the total FELA payout). This figure illustrates the catastrophic effect of lawsuit claims on total payouts. The reason for this increase is not due to catastrophic injuries but rather to the availability in

8. Notably, in 1988, 50% of the injuries under the FELA were sprains and strains. In 1988 there were 64 amputations and 1,289 fractures. The fractures presumably included fingers and toes. The construction, mining, and manufacturing industries had higher amputation rates and the mining and construction industries had a higher fracture rate. See E. Saphine, *FELA and Rail Safety: A Response to Babcock and Oldfather–the Role of the Federal Employer's Liability Act in Railroad Safety,* 19 Transp. L. J. 901 (1990-1991).

addition to lost wages – of an award for lost future earnings, and pain and suffering.[9]

FELA cases also expose the state agency operating a commuter railroad to unpredictable awards, even if the employee is contributorily negligent, because of the component of pain and suffering and claims of permanency.[10] It is also worth noting that FELA claims are frequently built up by the employees staying out on the advice of counsel to bolster their claim for damages before a jury. The same employee who has claimed in litigation that he is unable ever to return to work and has claimed

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9. In a litigated case against SEPTA, an employee claimed that he slipped due to ballast. Despite the fact that there is no federal standard for ballast, the employee claimed that the ballast in the rail yard was harder to walk on than the ballast on mainline track. The employee returned to work and was earning close to the same amount of money; nevertheless, he claimed that his opportunities for overtime were limited, he had experienced pain and suffering, and was unable to play ball with his child. The employee was awarded over $660,000. Recently reported in the Legal Intelligencer, *"Ex-Amtrak Worker Awarded $2.5 Million in FELA Action"*, Feb. 18, 2003, pg. 1, was an FELA jury verdict. An Amtrak trackman, age 52, claimed to have two herniated discs. There was no surgery, his wage loss was estimated to be $350,000 and he was awarded $2.5 million.

10. Employees sometimes stay out so as to increase an FELA recovery. A report filed by Amtrak indicated that two years after one accident only one employee out of eleven had returned to work and that in a minor derailment in which no passengers were injured all fifteen employees claimed injury and had not returned to work. See Baker, *supra*, at 103. Indeed the trend was toward employees staying out to build up their claim of permanency. In one litigated SEPTA case, an employee claimed a permanent back injury and his doctor testified he would not be able to do his job. As part of the settlement on the record, the employee agreed (1) not to return to the railroad and (2) to take a sedentary job. After receiving his settlement, the employee then filed a grievance with the Railroad Retirement Board to obtain his position back, and claimed he had recovered. *United Transportation Workers' v. SEPTA*, Case #368. SEPTA then sought repayment of the award paid only two months earlier. Nevertheless, the court and the Railroad Retirement Board condoned this behavior and accepted the employee's claim that he was miraculously "cured".

"permanent damage" can then miraculously return to his former employment after receiving an award or a settlement. Additionally, since many FELA claimants immediately retain counsel, the cost of even a settlement is driven up because an attorney generally obtains a fee of 30 to 40%. *See, e.g.*, Herde, *supra*.[11]

Finally, this opinion will cause havoc with respect to existing labor negotiations and pension rights. If we are to treat all employees as if they are now railroad employees then existing contracts with the non-railroad unions will have to be renegotiated. Does this mean that all employees who were previously subject to bargaining with the unions that represent bus, trolley, and subway operators are now covered by another union? What about the pensions of employees in the City Division, a pension that is based on a formula under the benefits accorded through Social Security? Moreover, what happens to an employee in his fifties, who has just joined SEPTA? Under provisions of the Railroad Retirement Program an employee is required to work for forty quarters before vesting. Under the reasoning of *Greene,* would an employee deemed to be a railroad employee for purposes of FELA have to start contributing to the Railroad Retirement System and then be removed from the Social Security System? If the same employee ceased next year being involved with railroad projects would he then go back to Social Security? Since SEPTA's pension for non-railroad employees is based on contributions to Social Security this opinion implicates pension rights of its entire workforce.

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11. A book informing railroad workers of their rights suggests that they answer as little as possible about an accident. See, John H. Blount & J. Edward Dvorak, III, *Justice for the Injured Railroad Worker (And How to Achieve It)* 3-5 (1987). Obviously, after consulting with an attorney or union representative the accident report can be phrased in a way to establish the railroad's negligence. From the outset of the injury, the claim is immediately geared towards litigation and to build up the damages.

The Second Circuit opinion invites litigation, will deplete limited resources and impact on the retirement benefits and collective bargaining rights of numerous employees and should be overturned.

## CONCLUSION

Initially, the first FELA statute was found unconstitutional because it attempted to regulate purely intrastate activities. *See Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908). Subsequently, the statute was reenacted in its present form to regulate *only* interstate railroad activities. See 45 U.S.C. §51 *et seq.* (1982). The Court of Appeals' holding in this case jeopardizes any state entity that operates commuter rail lines and its logical result is for a state to curtail any such service. Now, instead of 1,200 public employees of SEPTA who are covered by the FELA, the logical extension of the Court of Appeals' opinion is that the remaining 7,900 employees of SEPTA can also now sue under the FELA. Such an extension to every employee of the agency – no matter how remotely connected with the operation of the interstate railroad – was never the intent of the Act and offends principles of sovereign immunity. This holding will result in operating deficiencies and may result in the withdrawal of rail service run by state agencies.

Certiorari should be granted to provide guidance on an expedited basis before agencies across the country are exposed to suits and increased costs while the resolution of who is covered by this Federal statute is further delayed and subject to litigation in each Circuit.

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No. 02-1173

IN THE

# Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
*Petitioners,*

v.

SEAN GREENE,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED FOR REVIEW

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, provides a comprehensive remedial scheme for employees of common carriers by railroad injured in the course of their employment due to the negligence of their employers. This case presented two significant questions for review:

First, whether the Eleventh Amendment to the United States Constitution protects public transit agencies created by state law from liability under FELA for injuries suffered by their employees.

Second, whether FELA extends to public transit agencies who do not operate interstate railroads themselves, but that have subsidiaries or contractors that are "common carrier[s] by railroad."

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Public Transportation Association ("APTA"), as *amicus curiae,* supports the Petition of Metropolitan Transportation Authority ("MTA") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.[1] Counsel for both parties have given their consent for APTA to file this brief, and verification of that consent has been filed with the Court.

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6. Petitioner Metropolitan Transportation Authority, however, is a dues-paying member of APTA.

## INTEREST OF *AMICUS CURIAE* AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

APTA is a non-profit trade association of more than 1,500 public and private member organizations responsible for planning, designing, constructing, financing and operating public transportation systems. APTA's members include state associations, academic institutions, state departments of transportation, public transit agencies, metropolitan planning organizations and businesses that supply products and services to the public transportation industry.

The decision below threatens to upset the established expectations of the 17 public transit agency members of APTA that provide commuter rail service as part of the public transportation system with respect to the coverage of their employees under FELA.

First, many public transit agencies are creatures of the State and therefore enjoy sovereign immunity from suit under federal causes of action. The decision below would subject such agencies to suit under FELA contrary to sovereign immunity principles under the Eleventh Amendment of the U.S. Constitution as reaffirmed by this Court in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) and *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987).

Second, the commuter rail operations of many public transit agencies nationwide (like the MTA) are performed by a separate division or subsidiary of the agency, or an independent contractor. These public transit agencies provide certain management services and establish policies for the commuter rail operations, but many of them do not themselves directly operate the trains.

Third, the decision below conflicts with findings and decisions of the Railroad Retirement Board, the Interstate Commerce Commission (now the Surface Transportation Board) and the National Mediation Board that have not found public transit agencies to be covered by the rail statutes they administer. These other rail statutes apply the same "carrier" test as FELA.

## STATEMENT OF THE CASE

This case arises from a car accident in which Plaintiff-Respondent Sean Greene claims he was injured during the course of his employment duties. At the time of his injury, Greene was a police officer employed by MTA, a public benefit corporation created pursuant to the laws of the State of New York. Greene filed this case in the United States District Court for the Eastern District of New York, seeking damages for his work related injury from MTA under FELA. *See Greene v. Long Island R.R. Co.*, 99 F. Supp. 2d 268 (E.D.N.Y. 2000), Petitioner's Appendix[2] at 32a-45a, *aff'd* 280 F.3d 224 (2d Cir.), Pet. App. at 1a-28a, *reh'g denied en banc*, No. 009292 (2d Cir. Nov. 13, 2002), Pet. App. at 46a-47a.

MTA was created by the Legislature of the State of New York in 1965 under the State's Public Authorities Law, N.Y. Pub. Auth. L. § 1263(1)(a) (McKinney 1999). MTA's statutory responsibilities include "the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, *including but not limited to such transportation by railroad*, omnibus, marine and air." *Id.* § 1264(1) (emphasis added).

The Legislature of the State of New York granted MTA the power to "acquire . . . any transportation facility," *id.*, and to "operate, maintain, renovate, improve, . . . or repair" such a facility and "lease railroad cars for use in its passenger service." *Id.* § 1266(2) & (7). MTA is authorized to levy and collect fares and to establish schedules, standards

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[2] Hereinafter citations to Petitioner's Appendix will be abbreviated "Pet. App."

of operation and public safety rules and regulations as necessary for the "use and operation of any transportation facility." *Id.* § 1266(3). MTA is also authorized to provide and maintain a police department for all MTA affiliates. *See id.* § 1266-h(1). MTA may exercise these powers itself or it may "cause one or more of its powers . . . to be exercised or performed by . . . one or more wholly owned subsidiary corporations." *Id.* § 1266(5).

MTA owns two subsidiaries that operate commuter railroads: the Long Island Railroad ("LIRR") and Metro-North Commuter Railroad Company ("Metro-North"). MTA does not operate any railroad system or services itself.

MTA filed a motion for summary judgment in the District Court, arguing that it is not a proper defendant under FELA because it is not a common carrier by railroad. *See Greene*, 99 F. Supp. 2d at 270, Pet. App. at 32a. The District Court denied that motion. *See id.* at 275, Pet. App. at 45a. The District Court found that by virtue of MTA's "extensive involvement" in LIRR's activities, MTA "operates" the LIRR's railroad. *Id.* at 274, Pet. App. at 43a. The District Court held that "it is not the corporate form of the entity" that determines an entity's status under FELA, but rather the "functions" it performs. *Id.* at 272, Pet. App. at 37a. The District Court held that FELA requires "nothing more" on the part of a parent "than to 'perform a function'" in connection with the subsidiary's railroad activities. *Id.* at 274, Pet. App. at 42a.

At MTA's request, the District Court certified the question of whether MTA is a common carrier under FELA to the United States Court of Appeals for the Second Circuit. *See Greene*, 280 F.3d at 229, Pet. App. at 7a. The Court of Appeals granted MTA's motion for leave to appeal pursuant to 28 U.S.C. § 1292(b), but ultimately affirmed the District Court. *See id.* at 229, 240, Pet. App. at 7a, 28a. The Court of Appeals found that FELA liability extends to any entity

that is substantially involved in the "management and operation of the business" of a railroad, and is therefore not limited to the owner or operator of the railroad. *See id.* at 230, Pet. App. at 8a. MTA timely filed a Petition for Rehearing with the Court of Appeals. *See* Pet. App. at 46a-47a.

Thereafter and following this Court's recent decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), MTA filed a motion with the Court of Appeals to remand the case to the District Court with instructions to dismiss Respondent's claims against MTA on the grounds that the Eleventh Amendment to the United States Constitution protects MTA from FELA suits by its employees. *See* Pet. App. at 29a-31a.

On November 13, 2002, the Court of Appeals denied MTA's petition for rehearing. *See id.* at 46a-47a. On January 21, 2003, the Court of Appeals denied MTA's motion to vacate, remand and dismiss on Eleventh Amendment grounds. *See id.* at 29a-31a. MTA's timely Petition for a Writ of Certiorari from this Court followed.

## REASONS FOR GRANTING THE WRIT

1. The Court should grant a writ of certiorari to review the question whether a public transit agency created by state law is entitled to assert Eleventh Amendment immunity from suit in an action brought by an employee under FELA. As Petitioner correctly points out, the decision below threatens the sanctity and stability of the treasuries of the States and is therefore at odds with this Court's recent jurisprudence confirming the immunity of the States from suit absent their consent. We will not repeat Petitioner's arguments here.

The decision of the court below effectively requires the obligation of state moneys to pay twice for the same injury to one of its citizens.[3] The courts of the United States simply lack that power, unless it is conferred specifically by an amendment to the U.S. Constitution adopted subsequent to the Eleventh Amendment. That is not the case here. FELA, the statute under which Respondent will receive his second recovery if this decision is allowed to stand, was enacted pursuant to Congress' powers under the Commerce Clause. *See Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1 (1912) (upholding constitutionality of FELA under commerce clause powers).

As this Court has consistently held in recent years, Congress lacks the authority under its commerce power to abrogate the states' immunity from suit, even when the statute purporting to subject the state to suit involves interstate or international transportation. *See, e.g., Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S.

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[3] In the case below, Respondent received workers compensation payments prior to asserting his FELA claim. *See* Petitioner's Brief at 2-3.

743 (2002); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468 (1987). The Court's recent jurisprudence confirms that neither MTA, nor any other public transit agency, waives that immunity by operating a railroad. *See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-85 (1999) (holding that state does not waive immunity from suit by participating in interstate commerce). It is illogical to suggest that a public transit agency can do so by being a parent of an entity that operates a railroad. To hold a parent liable when its subsidiary operates a railroad, when the parent would be immune if it operated the railroad itself is nonsensical and creates a conflict with the Court's holding in *Welch* in which the Court held that the Texas Department of Highways and Public Transportation was immune from suits by its employees under the Jones Act.[4]

Article III of the Constitution of the United States gives the judiciary no more power to encroach upon the sovereignty of the States than it has in an action against the

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[4] Section 33 of The Merchant Marine Act of 1920, commonly known as the "Jones Act," 46 U.S.C. app. § 688, incorporates FELA by reference and makes FELA remedies available to seaman. *See Welch*, 483 U.S. at 471. As the Court recognized in overruling *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the immunity issues in the Jones Act and FELA are symmetrical. *See Welch*, 483 U.S. at 471.

United States.[5] This principle, confirmed by the people of the United States in the Eleventh Amendment to the U.S. Constitution, has properly guided this Court's recent jurisprudence under that Amendment. This case involves the application of that principle.

This principle is one of the most fundamental in the constitutional structure of the United States. The Constitution of the United States through the Appropriations and Property Clauses, U.S. Const. art. I, § 9, cl. 7; *id.* art. IV, § 3, cl. 2, reserves the power to collect and spend public moneys exclusively to the elected representatives of the people. Analogous provisions in the constitutions of the majority of the several states, at least one of which predates the Constitution of the United States, do the same.[6] Therefore, unless the strict test articulated by the Court in *Seminole* is met, *see Seminole Tribe of Fla.*, 517 U.S. at 55, neither the judiciary nor the executive has the power to

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[5] Just as the States are immune from private suits, the Court subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821). Of course, the United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (recognizing that the States adopted the Constitution which "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers). In *Hans v. Louisiana*, 134 U.S. 1, 17 (1890), the Court explained the principle of sovereign immunity as one and the same for both the States and the United States.

[6] *See* S.C. Const. art. XVI (1778), *available at* <http://www.yale.edu/lawweb/avalon/states/sc02.htm> (last visited Apr. 7, 2003). The current constitution of the State of New York contains an appropriations clause similar to that found in the U.S. Constitution. *See* N.Y. Const. art. VII § 7.

abrogate a State's immunity from suit and order that money from a state's public fisc be paid to a private individual. That strict test is not met when a state public transit agency or one of its subsidiaries or contractors operates a railroad.

Had Respondent's FELA action been brought against a federal agency, there is no doubt that the federal government would be immune from the suit absent a specific waiver of sovereign immunity.[7] This is particularly significant given the federal Department of Transportation's substantial ownership in and oversight of Amtrak. *See* 49 U.S.C. §§ 24302, 24304(d)(1). Simply because Amtrak itself may be exposed to FELA liability for work related injuries of its employees, it does not follow that the DOT is also exposed or that the federal government has waived its immunity from suit through its oversight of Amtrak. Nor have the States or their public transit agencies waived their immunity from suit under FELA by operating commuter railroads or by having subsidiaries that do. *See College Savs. Bank*, 527 U.S. at 681-85; *Welch*, 483 U.S. at 476-78.

2. The Court should also grant the petition to clarify whether the performance of certain management functions by a public transit agency for a subsidiary that is a "common

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[7] For example, the statutory history and the application of the Jones Act to the United States establishes that the United States did not waive its sovereign immunity by enacting FELA. This Court's jurisprudence has recognized that absent the waivers of sovereign immunity in the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-752, and the Public Vessels Act, *id.* §§ 781-790, the United States would be immune from suit under the Jones Act. *See, e.g., Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946), *overruled in part on other grounds Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949) (recognizing that Congress waived sovereign immunity of United States for Jones Act claims through Suits in Admiralty Act).

carrier by railroad" makes the public transit authority itself a "common carrier by railroad."

To be an employer covered by FELA, an entity must be (1) a common carrier; (2) a railroad; and (3) engaged in interstate or foreign commerce. *See* 45 U.S.C. § 51. The issue presented here is when, if ever, a parent organization that does not actually run the trains becomes a "railroad" subject to FELA liability.

The Court has twice before addressed the "railroad" element. In *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), the plaintiff's employer was a common carrier engaged in interstate commerce. The plaintiff worked in a railway express car that was part of a train operated by a railroad company. He brought suit under FELA against his employer, Wells Fargo, for injuries he suffered in a derailment.

The Court held that the employer was not an FELA employer because a railroad is:

> one who operates a railroad as a means of carrying for the public — that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad; by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employés; by the use of similar words in closely related acts which apply only to carriers operating railroads; and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown.

*Id.* at 187-88 (internal citations omitted).

The question of the kind of employer covered by FELA next came before the Court in *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968). In *Edwards*, the plaintiff's employer owned, maintained and leased refrigerator cars used to transport perishable goods in interstate commerce. The company repaired its own cars, and owned buildings and switching tracks for that purpose. *See id.* at 539. It serviced the cars while they were operating in interstate commerce and controlled their eventual destination, but the cars themselves were moved in trains operated by railroad companies. *See id.*

Although the Court agreed that "it is undoubtedly true that [the company] performs some railroad functions," it held that it was not a railroad within the meaning of FELA. The Court noted "that there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." *Id.* at 540. To be liable under FELA, the plaintiff's employer must do more than "perform[] some railroad functions," it must be a "going railroad." *Id.* at 539-40.

The test the Court articulated in these cases restated the statutory wording without giving specific insight into what makes an entity a "railroad," other than to say that it must be a "going railroad" "operated" by the entity the plaintiff was seeking to hold liable under FELA. *See Edwards*, 390 U.S. at 540; *Taylor*, 254 U.S. at 187-88. At least since *Taylor* was handed down in 1920, it has been commonly accepted

that to be a "railroad" an entity actually had to run the trains.[8]

In reliance on these decisions, the States have structured their public transit agencies in such a way as to provide a sharp demarcation between entities that are unquestionably railroads (such as the LIRR) and other transit operations that are not (such as toll bridges or bus services). Some public transit agencies, like MTA, have commuter railroads as subsidiaries; others, such as APTA member Southeastern Pennsylvania Transportation Authority, organize their railroads as separate divisions. *See Felton v. Southeastern Pa. Transp. Auth.*, 952 F.2d 59, 60 (3d Cir. 1992). Still others, such as APTA member Massachusetts Bay Transportation Authority, contract with outside railroads to provide the actual transportation services. *See* Mass. Gen. Laws ch. 161A § 3(f) (West 2000).

Regardless of the exact legal relationship between the public transit agencies and the entities that actually run the trains and other transportation services, the "parent" organization typically provides overall management functions, such as finance, budgeting, marketing, labor relations and real estate, for all of the modes of transportation offered. In the case of MTA (and many other

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[8] *See, e.g., Iverson v. Southern Minn. Beet Sugar Coop.*, 62 F.3d 259 (8th Cir. 1995) (holding that factory owner with in-plant railroad not subject to FELA liability); *Sullivan v. Scoular Grain Co. of Ut.*, 930 F.2d 798 (10th Cir. 1991) (holding that joint venture that owned tracks but did not operate railroad not subject to FELA liability); *Chaneyfield v. City of N.Y.*, 525 F.2d 1333, 1337-38 (2d Cir. 1976) (holding that operating much cars in a tunnel project does not subject employer to FELA liability); *cf. Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967) (holding that steel company was subject to FELA liability because it owned and operated railroad equipment and performed rail services itself).

APTA members) the public transit agency also provides security for all of its operations — railroad, buses, bridges and the like.

A primary purpose of centralizing such functions is to provide cost-effective management and overall policy guidance for all mass transportation services on a regional basis. In many cases, the public transit agency assumed ownership over what were previously privately-owned transportation companies that simply could not provide the services at a profit. Public transit agencies are able to provide comprehensive transportation solutions, raise money to rehabilitate old facilities and build new ones with taxpayer-backed bond issues or local tax revenues, and cut costs through centralized and coordinated management. Moreover, in these perilous times, public transit agencies can allocate resources for security of the traveling public where they are most needed.

The court below very broadly held that the MTA is a "common carrier by railroad" because, in its analysis, there is more to the operation of the business of a railroad "than the operation of the transportation facilities themselves." *Greene*, 280 F.3d at 240, Pet. App. at 27a.

If the courts below had found that Respondent was an employee of the LIRR because he was a borrowed servant, or acting for the MTA and the LIRR simultaneously, then we know what the proper test for determining whether he was covered by FELA would be.[9] But the Court of Appeals did not take this position. Rather than consider *the employee's*

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[9] *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 325-26 (1974) (holding that person not employed by a railroad but providing services to the railroad does not satisfy FELA's requirement that he was injured "while employed by" railroad unless he meets the common law "borrowed servant" test).

*relationship to the LIRR* (i.e., whether he was a borrowed servant of the LIRR), the court below focused instead on *the employer's relationship to the LIRR*. That cannot and should not be a proper consideration.

3. If MTA and entities like it are held to be "going railroads," then FELA will displace workers compensation or similar laws applicable to state employees for far more than just police or security forces guarding parking lots, depots and bridges.[10] The Court initially interpreted FELA to require a plaintiff employee to show that "at the moment of injury" he or she was engaged in an activity that constituted interstate commerce. *See, e.g., Shanks v. Delaware, Lackawanna & W. R.R. Co.*, 239 U.S. 556, 557-58 (1916). Congress amended the statute in 1939 to broaden the category of covered employees to include not just persons who were actually engaged in interstate or foreign commerce at the time of their injury, but also persons any part of whose duties were in the furtherance of, or "directly or closely and substantially" affected such commerce. Act of August 11, 1939, 53 Stat. 1404 (1939). The amendment was "designed to obliterate fine distinctions" based upon what tasks the employee was performing at the time of injury. *Reed v. Pennsylvania R.R. Co.*, 351 U.S. 502, 505 (1956); *see also* Senate Committee on the Judiciary, Amending the Employers' Liability Act, S. Rep. No. 661, 76th Cong., 1st Sess. 2-3 (1939).

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[10] For example, the Georgia Court of Appeals recently confirmed that employees of APTA member Metropolitan Atlanta Rapid Transit Authority are covered by the Georgia Workers Compensation Act rather than the Georgia Employers' Liability Act (which is modeled on FELA). *See Williams v. Metropolitan Atlanta Rapid Transit Auth.*, 542 S.E.2d 199 (Ga. Ct. App. 2000).

As a result of the 1939 amendment, FELA was extended to cover clerical personnel and others who are not exposed to the special hazards of the railroad industry. *See Reed*, 351 U.S. at 505-06. Indeed, anyone who worked for a "common carrier by railroad" engaged in interstate or foreign commerce became entitled to assert the remedies provided by FELA because the "benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands." *Id.* at 506.

APTA's member public transit agencies have been organized in large part on the basis that employees who did not work directly for the entity providing rail services were not covered by FELA. Thus, injured employees who worked for public transit agencies (as opposed to the subsidiaries or divisions directly operating the trains) were covered under workers compensation laws, or the equivalent for state employees. If the decision below is allowed to stand, then employees of public transit agencies could be considered employed by a "going railroad," and thus able to sue in state or federal courts for damages under FELA. Not only would such a result displace settled expectations, it would disrupt legal relations carefully constructed by state laws.

The financial effects of altering the basis of liability from a no-fault system of defined workers compensation benefits to a fault-based tort system may be devastating. FELA's "featherweight" burden of proof — coupled with the availability of tort damages for not only medical expenses and lost wages, but also damages for pain, suffering and mental anguish — will increase the likelihood of large, unpredictable judgments. *See, e.g., Norfolk & W. Ry. Co. v. Ayers*, __ U.S. __, No. 01-963 (Mar. 10, 2003). The public transit agencies' present insurance coverage will have to be extensively revised to shift from much cheaper workers

compensation coverage to liability insurance covering tort claims.[11] For those entities that are self-insured, the exposure to large tort judgments may threaten their financial viability and the ability to provide essential transportation services to the public.[12]

4. The decision below also conflicts with prior administrative decisions holding that public transit agencies are not common carriers by railroad and that their labor relations are not governed by the Railway Labor Act, 45 U.S.C. §§ 151-188, but rather by state law. *See, e.g., State of Cal. v. Taylor*, 353 U.S. 553 (1957). In this respect, the decision below is directly contrary to those of the National Mediation Board, the entity which supervises labor relations in the railroad industry. The National Mediation Board has previously determined that the MTA is not covered by the Railway Labor Act despite its relationship with the LIRR and Metro-North. *See Application of Int'l Bhd. of Teamsters*, 8 N.M.B. 1, 3-4 (1980). The decision below also calls into question whether employees presently covered either by state retirement systems or by Social Security should instead be covered under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v. However, the Railroad Retirement Board, which is the Federal agency that administers the Railroad Retirement Act, has determined that APTA member Massachusetts Bay Transportation Authority, which contracts with an independent contractor for commuter rail services, is not subject to the Railroad

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[11] *See* 101 Cong. Rec. E3622 (daily ed. Oct. 31, 1989) (remarks of Rep. Whittaker) (explaining that no-fault based state workers' compensation scheme is more cost-effective than the billion dollar a year cost of FELA to railroad industry).

[12] *See* 101 Cong. Rec. S9813 (daily ed. Aug. 2, 1989) (remarks of Sen. Kasten) (highlighting sharp increase in FELA verdicts).

Retirement Act because it does not actually operate the service.[13]

The decision below has the effect of rejecting years of court decisions, federal and state legislation, and administrative regulation. For example, state agencies that have acquired abandoned railroads, or those about to be abandoned,[14] have not even been considered common carriers unless they directly operated the trains. *See, e.g.*, 49 C.F.R. § 1150.22 (2002). And federal regulators have not considered private holding companies performing essentially the same management functions as MTA to be "carriers" under the Interstate Commerce Act. *See, e.g., Guilford Transp. Indus., Inc.*, 366 I.C.C. 294 (1982). Finally, Congress itself, in extending the benefits of FELA to additional railroad employees in 1939, expressly declined to broaden the definition of employers subject to the Act beyond direct operators of "going railroads." *Edwards*, 390 U.S. at 541.

The decision below, if not reviewed, will "dislodge settled rights and expectations [and] require an extensive legislative response." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Court should therefore grant review to consider whether a public transit

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[13] *See* Memorandum of Deputy General Counsel, Railroad Retirement Board, to Director of Research and Employment Accounts (Oct. 31, 1990). A copy of that Memorandum is included as Appendix A hereto.

[14] For example, prior to becoming a subsidiary of MTA, the LIRR was a private railroad that became financially ruined as of 1965. As a result of its precarious financial situation, the State of New York assumed operations, ultimately acting through MTA. *See* Joseph J. Amato, *The MTA, It's Not "Going Your Way" — Liability of the Metropolitan Transportation Authority Under FELA: Greene v. Long Island R.R.*, 75 St. John's L. Rev. 113, 121 n.50 (2001).

authority operates a "going railroad" by performing certain management functions for a railroad subsidiary that do not involve directly operating the trains.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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April 11, 2003

# Appendix A

## APPENDIX A

UNITED STATES GOVERNMENT RAILROAD RETIREMENT BOARD
MEMORANDUM L-90-160
OCT 31 1990

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: Massachusetts Bay Transportation Authority Employer Status

This is in response to your Form G-215 dated August 1, 1990, wherein you asked me to determine the status of the Massachusetts Bay Transportation Authority (hereafter MBTA) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer status of MBTA has not previously been considered. The MBTA is a political and corporate subdivision of the Commonwealth of Massachusetts established in 1964 under section 2, Chapter 161A of the General Laws of that state. The MBTA has the authority to conduct mass transit operations within its area of operations. In a letter dated June 28, 1990, Mr. Ralph L. Duvall, MBTA's Director of Railroad Operations, advised the Board that MBTA has contracted with the National Railroad Passenger Corporation (hereafter Amtrak), an employer covered under the Acts, to operate 479.1 track miles used in commuter service. One of the commuter lines (the Attleboro line) crosses into Rhode Island. MBTA's contract with Amtrak went into effect on January 1, 1987. Amtrak employs 1031 people to provide MBTA commuter service. These employees are compensated and reported by Amtrak through its own payroll. Mr. Duvall further stated that MBTA is not subject to the jurisdiction of the Interstate Commerce Commission and its operations do not use any electric locomotive power. He also provided a copy of the

contract between MBTA and Amtrak which is currently in effect.

As you are aware, the definition of an employer is found un section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231 (a) (1)) and in a substantially similar provision of the Railroad Unemployment Insurance Act. An employer is defined, in pertinent part, to include:

> "(i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49 [the Interstate Commerce Act];
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, on or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, * * *."

In general, (former) Part I of the Insurance Commerce Act applies to common carriers engaged in the transportation of passengers or freight, wholly or in part by railroad, in interstate commerce. A governmental unit can be a common carrier so as to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Legal Opinions L–81–160 and L–90–47.

Subchapter I of Chapter 105 of Title 49, section 4(b), provides as follows:

> "(b) the Interstate Commerce Commission does not have jurisdiction under this subtitle over rail mass transportation provided by a local public body if –

(1) the Commission would have jurisdiction but for this section; and

(2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided." 49 U.S.C. § 10504(b).

Section 6, Chapter 161A of the Annotated Laws of Massachusetts provides that the affairs of MBTA shall be managed by a board of directors appointed by the governor of the state. Thus, in accord with 49 U.S.C. § 10504(b), the MBTA, like other providers of mass rail transportation, is not subject to the Interstate Commerce Act. However, Subsection (c) of that section provides as follows:

"Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to applicable laws of the United Sates related to: –

(1) safety

(2) the representation of employees for collective bargaining; and

(3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers."

The Railroad Retirement and Railroad Unemployment Insurance Acts are laws of the United States related to "retirement, annuity and unemployment systems". Therefore, the exemption contained in 49 U.S.C. § 10504(b) is not applicable to a determination regarding coverage under the Acts administered by the Board. 49 U.S.C. § 10504(c), cited above, is a clear

statement by Congress that providers of urban mass transit such as the MBTA may, notwithstanding their exemption under subsection (b) from ICC jurisdiction, be subject to laws such as the Railroad Retirement and Railroad Unemployment Insurance Acts.

However, in the past this office has not held a rail carrier to be an employer unless it has actually commenced operating a railroad. See Legal Opinions L–81–160 and L–90–47. The MBTA is not a operator of a railroad and has never done so to this date. It is merely a subsidy disbursing entity of state government which contracts with a rail operator, currently Amtrak, to provide commuter service. Such service has been provided by rail carriers, including the Boston and Maine, under contract since MBTA's inception in 1964. Pursuant to its current contract, Amtrak presently provides all services, including equipment, maintenance, training and employees. Employees providing service under the contract are compensated by Amtrak and reported through its payroll. Under the contract, the MBTA has no control over the operations of the commuter service provided by Amtrak, except the limited right to modify the schedule.

Therefore, it is my opinion that the MBTA is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. A new submission should be made if the MBTA should actually begin operating as a carrier by railroad. An appropriate Form G–215 is attached.

*/s/ Steven A. Bartholow*
Steven A. Bartholow

Attachment

Supreme Court, U.S.
FILED
APR 18 2003
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(6)

No. 02-1173

# In the Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

*Petitioner*,

v.

SEAN GREENE.

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF

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## REPLY BRIEF

The presence of no fewer than four *amicus* briefs urging the Court to grant certiorari demonstrates that this case is of national concern. Those briefs underscore the reasons why the approach taken by the Second Circuit conflicts with governing constitutional and statutory standards and upsets settled expectations of the agencies that oversee public rail transportation. One brief expresses the concerns of the association representing all public transportation officials and agencies throughout the country. Three other *amicus* briefs come from individual transportation agencies located in three other circuits. As they explain, review is necessary to uphold their exclusion from FELA coverage and to restore and settle the sovereign immunity to which these agencies are entitled, if confronted with FELA claims by their own employees. SETPA's *amicus* brief (at 3) explains that the decision below already has sparked additional FELA litigation against it.

### I. STATE TRANSPORTATION AGENCIES ARE ENTITLED TO SOVEREIGN IMMUNITY.

1. Respondent does not deny that New York treats the MTA as a State agency or that the Legislature declared that the MTA is "performing an essential governmental function in carrying out its purposes." N.Y. Pub. Auth. L. § 1264(2). Nor does he deny that the Legislature assumed that the MTA would share in the State's immunity, except to the limited and irrelevant extent that the Legislature gave its "consent" to certain claims against the MTA. § 1276.

Instead, respondent repeats the same arguments evidently accepted by the Second Circuit, insisting that the Second Circuit's "impact on the State treasury" test remains good law in determining whether a State agency is entitled to sovereign immunity. See *Feeney* v. *Port Auth. Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), aff'd on other grounds, 495 U.S. 299 (1990). See also *Fitchik* v. *New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir.

1989) (*en banc*) (applying "impact on State treasury" test).

This argument, however, frames the question that calls for review. There is no doubt that at one time the "impact on the State treasury" was viewed as a significant and perhaps controlling inquiry in evaluating an agency's claim to sovereign immunity. For example, in *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994), the Court concluded that a bi-state agency (the Port Authority of New York and New Jersey) created by Compact was not entitled to Eleventh Amendment sovereign immunity from FELA suits. The Court concluded that Compact agencies are not agencies of "a State" within the meaning of the Eleventh Amendment and that immunity should not be extended because the Port Authority's debts were "not liabilities of the two founding States" and the States "lack financial responsibility" for those debts. *Id.* at 37, 45.

However, the four dissenters in *Hess* (Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas), disagreed with the basic premise of the "impact on the State treasury" test. As the dissent stated:

> "The Court's assertion that the driving concern of the Eleventh Amendment is protection of state treasuries . . . is belied by the text of the Amendment itself. *** The Eleventh Amendment does not turn a blind eye simply because the state treasury is *not* directly implicated. *** We have always respected state flexibility in setting up and maintaining agencies charged with furthering state objectives." *Id.* at 60-61 (emphasis original).

Respondent and the Second Circuit now turn a "blind eye" to the Court's most recent sovereign immunity decision, *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), which prompted the MTA's claim of sovereign immunity. That decision last Term is the culmination of a crucial evolution in the Court's sovereign immunity jurisprudence. As our Petition explained, a

majority of the Court there upheld a State ports authority's claim to sovereign immunity, even though the litigation posed no threat at all to the State's treasury. The Court explained that the "primary function of sovereign immunity is not to protect State treasuries . . . but to afford the States the dignity and respect due sovereign entities." 535 U. S. at ___ (slip op. 24).

Under this standard, the MTA and other agencies created by State legislatures to perform the "essential government function" (N.Y. Pub. Auth. L. § 1264(2)) of coordinating regional transportation or directly providing that transportation are entitled to share in the State's immunity. Indeed, respondent also ignores the decisions leading up to the *South Carolina Ports* case, which had overruled the Court's earlier decision in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964). *Parden* had declined to recognize the sovereign immunity of a State railroad agency faced with FELA claims. Its overruling means that these agencies now are entitled to immunity from FELA claims, even if they are deemed "railroads" under FELA.

2. The New York Legislature and New York courts correctly treat the MTA as "a State agency" for the purpose of constitutional immunity. Without contesting any of the authorities the MTA cited for this proposition, respondent asserts that the Governor only "selects" five members of the MTA's board of directors, while twelve are "selected" by other officials. This is not true. Various officials of the communities the MTA serves have the right to *propose* candidates for twelve of the seats, but the Governor decides whom to appoint to each of the seats:

> "The authority [MTA] shall consist of a chairman, sixteen other voting members, and two non-voting and four alternate non-voting members . . . *appointed by the governor by and with the advice and consent of the senate*."

N.Y. Pub. Auth. L. § 1263(1)(a) (emphasis added).

In addition, the Governor may remove *any* board member for "neglect of duty." § 1263(7).

Moreover, in addition to this gubernatorial control, the Legislature and various other State bodies are actively involved in supervising the MTA's activities. The MTA is obliged to consult with the State Division of the Budget and the Department of Transportation on various matters. § 1263(4)(b). The State Comptroller audits the MTA's books. § 1276-a. The MTA's capital programs must be reviewed by a separate Board appointed by the Governor, and that Board must approve any bonds the MTA proposes to issue. §§ 1269-b(1), (9) and 553(20). The State limits the amount of bonds the MTA can issue. § 1269(12). On the flip side, the State provides over a billion dollars a year to help fund the MTA's operations through the State's transportation assistance program, debt service on transportation bonds, and appropriation of "dedicated" portions of taxes on motor vehicles, fuel, and regional sales taxes. See, *e.g.*, § 1270-c; N.Y. Transp. L. § 18-b; N.Y. State Fin. L. § 88-a(7).

Thus, structurally, functionally, and financially, the MTA is an "arm of the State." As such, it is entitled to the State's immunity from FELA suits. As explained in the various *amicus* briefs, the Second Circuit's refusal to recognize this immunity concerns not only the MTA but dozens of other public transportation agencies around the country whose immunity has been thrown into doubt.

## II. FELA Does Not Apply to Agencies or Corporations That Own and Oversee Operating Railroads But Are Not "Going Railroads."

1. In arguing that the Second Circuit applied a "rather long standing and time tested" standard for determining FELA coverage (Br. in Op. 1), respondent perpetuates the

flaw in the lower court's approach. Each of the cases on which respondent relies arose under a different statute with different definitions and objectives. As explained in the Petition (21-22 & n.5), those cases have nothing to do with determining whether Congress intended to subject a railroad's parent *to FELA claims* by its employees. Like the Second Circuit, respondent ignores the test this Court has fashioned for identifying the entities that are subject to FELA — the "going railroad" test established in *Wells Fargo & Company* v. *Taylor*, 254 U.S. 175, 187-88 (1920), and *Edwards* v. *Pacific Fruit Express Company*, 390 U.S. 538, 540-41 (1968).

Respondent brands as "ludicrous" (Br. in Op. 4) the MTA's statement that it is "not a railroad." He asserts that in November 2002 the MTA announced "a merger of the Long Island Railroad and Metro-North Commuter Railroad to form a new 'MTA Railroad'." *Ibid.* This assertion is both factually inaccurate and legally irrelevant. The MTA Chairman announced a *proposal* to merge the MTA's various operating subsidiaries (including its two railroads) into "five distinct companies under the MTA." MTA Press Release No. 31 (October 9, 2002). One of those new subsidiary companies would take the "two separate rail companies" that the MTA "oversees" and merge "the two railroad managements into a single structure" to "create a more efficient railroad, one with a broader regional focus." *Ibid.* Thus, even this proposal would retain the legal distinction between the MTA on the one hand and its "distinct" operating subsidiaries (railroads, bridges and tunnels, subways, and bus companies).

Moreover, reinforcing our point that the MTA itself is an arm of the State entitled to sovereign immunity, this proposed restructuring will require action by the New York Legislature. Both the MTA and many of its subsidiaries are creatures of the Legislature. No legislation has yet been introduced to achieve this realignment.

Most significantly, this proposed "merger" of the MTA's two operating railroad subsidiaries would no more make the parent of that combined railroad a "railroad" under FELA than does the MTA's current ownership of *two* separate railroad companies. Thus, even if the Legislature were to approve the proposed restructuring, the central issue would remain the same as when this case began: Under what circumstances is the legally distinct parent of a separately incorporated operating railroad subject to FELA?

2. In answering that question respondent relies on the Second Circuit's novel standard for FELA coverage, declaring that it was sufficient to show that the MTA is "integrally involved in the essential business aspects of the Long Island Railroad's operation." (Br. in Op. 3). However, as discussed in the next section of this Reply Brief dealing with the "veil piercing" issue, a parent's "involvement" in the "essential business aspects" of its railroad subsidiary does not obliterate the legal distinction between the two entities. It does not transform a State agency into a "railroad" simply because the agency oversees the "essential business aspects" of its railroad subsidiaries. Otherwise, the MTA's similar statutory responsibility for overseeing and coordinating the business affairs of its other subsidiaries would make the MTA a subway, a bridge or tunnel, or a bus company!

As Justice Brandeis observed in a related context, Congress uses the term "carriers" "as it is understood in common speech" to mean particular railroads "as distinguished from the corporations owning or operating them." *Missouri Pac. R.R. Co.* v. *Ault*, 256 U.S. 554, 559-60 (1921). The *amici* explain why it is so important for this Court to reaffirm that the correct test for FELA coverage is not whether a transportation agency or corporate parent supervises its railroad subsidiary but whether the parent itself may fairly be termed a "going railroad." As explained in the Petition (18-19), every other circuit has understood that FELA does not enter the picture *unless* the injured worker

was employed by a "going railroad." They use the inquiries framed by *Lone Star Steel Co.* v. *McGee*, 380 F.2d 640 (5th Cir. 1967), on which the Second Circuit mistakenly relied, only to determine whether the "going railroad" is a "common" carrier and is operating in "interstate" commerce.

## III. THE PARENT OF AN OPERATING RAILROAD IS SUBJECT TO FELA ONLY IF THE COMMON-LAW STANDARDS FOR "PIERCING THE CORPORATE VEIL" ARE MET.

1. The third question presented by the Petition asks the Court to decide whether, as the MTA argued to both courts below, the common-law standard for "piercing the corporate veil" is the test the courts must use in evaluating any attempt to hold the separately incorporated parent of a railroad subject to liability under FELA. In the Petition (25), the MTA cited a string of cases in which this Court has insisted that, unless expressly displaced by statutory text, FELA incorporates common law doctrines and must be construed in light of common law principles. The Court extended that unbroken line of decisions in its intervening opinion in *Norfolk & Western Ry. Co.* v. *Ayers*, 538 U.S. __ (March 10, 2003). Although several Justices disagreed about how to apply the relevant common-law standards to the issue before the Court, all Members of the Court agreed that the nature and scope of the railroad's liability must be determined using common law doctrines. 538 U.S. at __ (slip op. 6).

In looking for the governing common law principles, the "state of affairs when the FELA was enacted" is the pertinent inquiry. 538 U.S. at __ (slip op. 27). When Congress enacted FELA in 1908, the common law of corporations had already settled the principle that the courts must respect the separate legal identities of the owners of a corporation and the corporation itself, including the distinction between a corporate parent and its separately incorporated subsidiary. A basic corollary of this principle was that any regulations or liabilities applicable to the subsidiary did not apply to the

corporate parent or controlling shareholders. See A. Berle & G. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY 128-29 (1932).

By the early part of the twentieth century, the common-law courts had evolved a very narrow exception to this principle. As summarized by the seminal article that coined the term "piercing the corporate veil," the "concept of corporate entity should be ignored and the veil drawn aside" only when used to "defraud creditors", "evade an existing obligation", or otherwise make the corporate distinction a reflection of "knavery." I.M. Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496, 517 (1912). Thus, the exception allowed the courts to attribute a corporation's duties and liabilities to its parent or controlling shareholders if, but only if, the corporate form was essentially a sham.

When FELA was enacted, virtually all railroads were organized in the corporate form, including some that were subsidiaries of corporate holding companies. Congress's decision to impose FELA obligations only on what this Court has repeatedly termed the "going railroad" permits only one conclusion: FELA does not expose the *owners* of the "going railroad" to liability, unless a claimant can satisfy the prevailing standards for "piercing the corporate veil."

The MTA argued below that this must be the inquiry, but the Second Circuit fashioned a much more expansive test. It premised the MTA's exposure to FELA on the same kinds of traditional parent-subsidiary oversight that this Court in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), held insufficient to satisfy common-law veil-piercing standards deemed incorporated in CERCLA. Earlier this Term the Court reached the same result under the fair housing statute. *Meyer* v. *Holley*, 537 U.S. __ (January 22, 2003). Under these standards, "the MTA's activities fall within the 'accepted norms of parental oversight of a subsidiary's facility,' which is more than sufficient to insulate the MTA

from liability under FELA." Comment, *The MTA, It's Not Going Your Way" — Liability of the Metropolitan Transportation Authority under FELA: Greene v. Long Island R.R.*, 75 St. John's L. Rev. 113, 130 (2001) (quoting *Bestfoods*, 524 U.S. at 72). The presence of several *amicus* briefs supporting the MTA's petition shows that it is extremely important to public transportation agencies and corporate parents of operating railroads to have the Court decide that common-law veil-piercing standards also must be used in FELA cases.

2. Nearly thirty years ago, the Court addressed an issue related to the question here. It considered when a worker *not* employed by a railroad may bring a FELA claim *against the railroad.* In *Kelley* v. *Southern Pacific Company*, 419 U.S. 318 (1974), the injured worker was employed by a trucking company that loaded freight onto rail cars under a contract with the railroad. He was injured when he fell off a rail car. He sued the railroad rather than the trucking company, claiming that he was injured "while employed" by the railroad. The district court had employed an expansive test for FELA coverage, concluding that the relationship between the railroad and the worker's employer made both the trucking company and its employees the railroad's "agents." This Court rejected that approach as inconsistent with FELA's limited coverage. The Court explained that, applying "common law principles," the "while employed" standard of FELA can only be satisfied by "proof of a master-servant relationship *between the plaintiff and the defendant railroad.*" *Id.* at 323-24 (emphasis added).

Under any of the relevant "common law" tests, the Court required that a FELA plaintiff must prove the basic element of a "master-servant" relationship with *the railroad*: that is, that the railroad "controlled or had the right to control the physical conduct" of the plaintiff when he performed work on the railroad's behalf. *Id.* at 325.

Since respondent Greene could not satisfy the *Southern Pacific* test, he has no viable claim against the only railroad conceivably involved here, the LIRR. Greene was not just "nominally" employed by the MTA, rather than the LIRR. His assignments and his dispatch to conduct an investigation were controlled by the MTA's Police Force, for which he worked, not by the LIRR.

The issue, then, is whether Greene nevertheless has a FELA claim against the LIRR's *parent*, his *non-railroad employer*. In allowing his claim, the courts below refused to recognize and apply the controlling common-law test — veil piercing. In deciding that claims like this may proceed against a railroad's parent, the lower courts disregarded FELA's focus on the actual employment relationship, ignoring the need to show that the plaintiff was injured "while employed by" *the railroad*. Instead of focusing on the degree of control exercised *by the operating railroad* over *the plaintiff*, as *Southern Pacific* requires, the courts relied on the degree of control *by the plaintiff's employer* over *the operating railroad*.

The Court should grant review to decide that employees of entities that furnish services to railroads (who cannot bring FELA claims against the railroads under *Southern Pacific*) cannot substitute their own employers as FELA defendants, unless they can satisfy common-law veil-piercing standards.

Respectfully submitted.

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